Mr. SERJEANT STEPHEN'S

New Commentaries

LAWS OF ENGLAND

(PARTLY FOUNDED ON BLACKSTONE)

By JAMES STEPHEN, Esq., LL.

JUDGE OF COUNTY COURTS.

"For hoping well to deliver myself from mistaking, by the order and perspicuous expressing "of that I do propound, I am otherwise zealous and affectionate to recede as little from "antiquity, either in terms or opinions, as may stand with truth, and the proficience of know- "ledge."—Lord Bac. Adv. of Learning.

Th inth

BY

HENRY St. JAMES STEPHEN,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

IN FOUR VOLUMES.

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FROM THE

PREFACE TO THE ORIGINAL EDITION.

Of the plan and principle of this work on the Laws of England, and of the views on which it was undertaken, it may be right here to give some explanation. Though the celebrated Treatise of Blackstone still remains without a rival, as an introductory and popular work on the laws of England, the positions which it contains have been nevertheless so trenched upon by alterations in the law itself of modern date, that if the student were to rely upon its text, as containing an accurate account of our present system of jurisprudence, he would be led continually astray. The later editions of that work have consequently comprised a copious accompaniment of corrective and supplementary notes at the bottom of the page: but it is not in the nature of such a method (with whatever ability pursued) to give entire satisfaction, because it obliges the reader to transfer his attention, incessantly, from the text to the commentary, and augments also, to a considerable degree, the bulk and consequent expense of the volumes. These considerations led me to conceive that a work might prove acceptable,

which should be framed upon the plan of introducing the necessary alterations into the text itself; but the question then arose, whether it would be better to confine my effort to the reparation of those defects which new legislation and new decisions had occasioned, or to take a bolder course, and, discarding all solicitude about the measure of my adherence to the original work, to interweave my own composition with it, as freely as the purpose of general improvement might seem to require. It was upon the latter plan that I fixed, though with some hesitation, my choice.

It may be thought, perhaps, that the confidence which carried me thus far, might naturally have tempted me farther, and taught me to aspire to the construction of an entirely new treatise. But if I had been conscious of faculties adequate to such an enterprise, I should still have declined it, as founded, in my judgment, on a wrong principle. The unimpaired portion of Blackstone's Commentaries comprises many passages, which (free in other respects from objection) are so far valuable at least, that they bear the stamp of his authority; and many others whose merit is of the highest order, being distinguished by all the grace and spirit of diction, the justness of thought, and the affluence of various learning, to which he owes his fame. These relics, which are in considerable danger of perishing by their in-

corporation in a work now falling into decay, may be lawfully converted by any new Commentator on the Laws, to his own purposes; and it is manifestly not less his duty than his interest, to make the appropriation. He cannot reasonably hope to rival their excellence; and to attempt to displace them for original matter of his own, is consequently an injury to the public, and to the science of which he treats.

All passages, then, which appeared to me to fall under either of the descriptions above given, I have made it my principle to retain; but my deviations from the original work have, nevertheless, been frequent and extensive. Independently of certain objections to its arrangement (to which I shall presently revert), its exposition of particular subjects appeared to me to be often deficient in depth, in fulness, or in precision, and in some instances to be even chargeable with positive inaccuracy; so that, as I had prescribed to myself the rule of departing from Blackstone wherever I felt dissatisfied with his performance as well as where any change in the law had made a departure indispensable, it is seldom that I have been able to pursue the text for several pages in succession, without the introduction (more or less extensively) of matter from my own pen. Large portions, indeed, of original composition will be found frequently to occur in a continuous form; and even where the text of my predecessor is pursued with shorter interruption,

rights of the three first descriptions, this is obvious, and the precedence therefore is properly assigned to them in Blackstone's work; but it is equally true with regard to property also—for property, like the rest, unquestionably constitutes one of the circumstances to which the social relations are adjusted, and to which they must be supposed to refer. To this right, therefore, the next place ought, in point of correct arrangement, to have been allotted; but the Commentator's plan of division makes this impossible, and compels him, after a short notice of property, to pass on, and to postpone its further examination, until all relative rights (whether private or public) have been exhausted. This inversion of the natural order is not only inartificial, but often embarrasses the discussion of rights of the relative kind. Thus in the chapter on Husband and Wife, every reader must perceive the disadvantage of the total omission to notice the effects of marriage in regard to the property of the parties; and yet until the subject of property in general had been examined, any disquisition on the proprietary rights

"the rights of persons, I now come to the rights of things. And though "according to the usual method of civilians, and our antient common law "tractates, this comes in the second place, after the *jura personarum*, and "therefore I have herein pursued the same course, yet that must not be "the method of a young student of the common law, but he must begin "his study here, at the *jura rerum*; for the former part contains matter "proper for the study of one that is well acquainted with those *jura* "*rerum*." Hale's Anal. sect. 23. This passage had not attracted my attention until my principle of division had been fixed upon; and its subsequent discovery was of course calculated to give me increased confidence in the propriety of my choice.

attending that particular relation, would have been obviously premature.

Another, and a still more important objection to the method which considers *Rights* as consisting either of *Rights of Persons* or *Rights of Things*, is that it fails to embrace the whole compass of rights. There is a branch of law which belongs (properly speaking) to neither of these divisions, but of great and growing importance in our municipal system, that, namely, which concerns the social, as distinguished from the political, ecclesiastical, and judicial institutions of the country, and which comprises (among many other subjects) the laws relating to the poor, to highways, to public charities, and the like. For topics such as these, the analysis of Blackstone affords no proper place, and when they are of too much importance to be neglected, expedients of an awkward kind are often devised to make room for them. Thus the law of highways and turnpikes is made incidental to the office of parish surveyor, and the large and interesting subject of the poor laws is dealt with, by way of digression from the office of overseer.

Dissatisfied for these reasons with Blackstone's arrangement of rights, and conceiving that it had not, like the other portions of his general method, become so inveterate among us, as to render its retention unavoidable, I have consequently ventured

to lay it aside, and to adopt, so far as this subject is concerned, a different plan of distribution. This plan is entirely of my own conception. It might have been supposed, indeed, that in a field so highly cultivated as that of Rights, I could be at no loss for a satisfactory precedent; but my search for one, though prosecuted with some diligence, was not attended with success. No writer on English or American law, who has deserted the order of Blackstone, had any pretension to be considered as a model—the repositories of the Roman jurisprudence (which, with the exception of the Institutes, are notoriously defective or confused in their arrangement) supplied nothing to the purpose—the Institutes themselves (from which the division into the rights of persons and of things was originally taken) could of course afford no assistance;—and, with respect to the continental systems, they either conform (as in the Code Civil of France) to the Institutes, or, when they depart (as in the treatise of Domat) from the beaten track, their course is not such as an English jurist could follow with advantage.

The general plan which I have thus ventured, on my own responsibility, to lay down, will be found at the commencement of the first book. Its leading principle is—to make the distinction between *Persons* and *Things* the foundation not of a primary, but of a subordinate arrangement, and to con-

sider *Persons* as constituting, in a primary sense, the only objects of the law's regard. But the persons, whom the law is supposed thus uniformly to contemplate, are presented, first, in the light of insulated individuals,—and in that capacity their *personal* (in other words their *bodily*) rights are examined; next, in their connection with the things around them,—which introduces the consideration of their rights of *property;* next, as members of families,—which involves their *rights in private relations;* and lastly, as members of the community,—which leads to the discussion of their rights in public relations, or (as they may be termed more compendiously) *public rights.*

According to this order, the absolute right uniformly takes the precedence of the relative, and the law of property in general is investigated before the relations of men, in regard to property, arise for consideration. Upon this system, too, the division of *Public Rights* allows of a sub-division conveniently adapted to the discussion of those mixed subjects to which we have before referred, and which, having no exclusive connection either with person or property, it is the tendency of Blackstone's method to exclude. Public Rights are accordingly divided into those which concern a man in his relations to persons in authority, whether civil or ecclesiastical, and those which concern him in his relations to his fellow citizens

large—the first of which falls under the heads of *The Civil Government*, and *The Church;* the second under that of the *Social Economy of the Realm;* and it is under this latter head that such mixed subjects, as above referred to, will find their regular and appropriate place. The entire arrangement of the work is consequently as follows:—

I. Of Personal Rights.

II. Of Rights of Property.
 1. As to things real.
 2. As to things personal.

III. Of Rights in Private Relations.
 1. Between master and servant.
 2. Between husband and wife.
 3. Between parent and child.
 4. Between guardian and ward.

IV. Of Public Rights.
 1. As to the civil government.
 2. As to the church.
 3. As to the social economy of the realm.

V. Of Civil Injuries.
 Including the modes of redress.

VI. Of Crimes.
 Including the modes of prosecution.

In a production bearing the relation that has been described to the work of a former writer, I have deemed it indispensable to supply the reader with the means of readily and precisely distinguishing the portions due to either commentator, or, I should rather say, of distinguishing them

with *more* readiness and precision than could be done by aid of the internal evidence resulting from the style or matter. The sense of this has led to a method of notation by brackets, the nature of which is explained in a Notice subjoined to this Preface. It has considerably increased both the labour and the expense of the publication, and by no means contributed to the beauty of its page. But the eye soon learns to accommodate itself to the novelty, and it is believed that the reader will experience no embarrassment from its adoption. It has not been thought necessary, however, to extend it to the notes. Among these, there are many which are not in Blackstone's work, but the reference that they bear to the text, or other circumstances, will in general be found sufficiently to distinguish them from the annotations of Blackstone himself.

PREFACE

TO THE

EIGHTH EDITION.

In this Edition of my father's Commentaries I have attempted to give the reader an account of the Laws of England as they existed at the close of the year 1879.

The effect of the Judicature Acts upon the administration of the Law, has been steadily kept in view throughout the work; and I have not shrunk from the responsibility of making up my own mind on a variety of points, arising for consideration in connection with those Statutes, about some of which, at all events, there may well be a difference of opinion, as there is an entire absence of authority. It is true that at the time of the last Edition, published early in 1874, I had to deal with the Judicature Act of 1873, which was then intended shortly to come into operation; but though I have no reason to suppose that I failed at that time to appreciate correctly the general effect of that measure, other

Judicature Acts and a fresh body of Rules of Procedure have since issued in profusion, which have rendered it necessary for me to renew my labours upon this part of the work. But I have now been aided to some extent by the decisions of the Courts (as reported down to the close of the year 1878) upon several questions on which an expression of judicial opinion was very desirable, and which have been brought to light by the experience of the few years during which the new system has been in operation.

I have considered it desirable in the Fourth Volume to draw the attention of the reader to some of the points on which an alteration of the law is suggested in the Report of the Commissioners to whose inquiry and consideration was referred the Criminal Code Indictable Offences Bill, 1878; though I have not taken any notice of the particular clauses of the Draft Code thereto appended, as they have not yet become law, and to have adverted to them would, in my judgment, have tended rather to confuse the student than to instruct him.

On the other hand, I have partly re-arranged the classification of crimes so as to treat of them under the same general Divisions or Titles as those adopted by the Commissioners, and thus to bring the last Book of the Commentaries into

harmony with the general structure of the proposed Code. And I have adopted this course because, while the propriety of this division of indictable offences in reference to a Code has received the sanction of the Royal Commission, it is also one which is applicable to the Criminal Law as it now exists.

I have entrusted the verification of the Statutes and Cases cited in the Work, and the preparation of each sheet as it has been sent to the printer, to my son, Mr. HENRY ST. JAMES STEPHEN, and he has also undertaken altogether the Index and the Table of Statutes, which in the present Edition have been usually cited as they appear in the "Revised Statutes." I have every reason to hope and believe that this division of labour, which has been a great relief to myself, has resulted in an accuracy of execution by which the public also will be benefited.

JAMES STEPHEN.

March, 1880.

PREFACE

TO THE

PRESENT EDITION.

THE preparation of this Edition has been committed to my charge in consequence of my father not feeling able himself to undertake the task, and at the same time properly to fulfil the duties of his office of a county court judge. I have therefore been deprived of the assistance I had from him in preparing the Eighth Edition for the press.

It is, however, a great satisfaction to me that the first three volumes have been revised and approved throughout by Mr. ARCHIBALD BROWN of the Chancery Bar, who has also revised and in some respects re-formed the Indexes to those three volumes; and the general reputation of Mr. BROWN for an accurate and extensive know-

ledge of law will (it is hoped) be some guarantee of the correctness of the exposition of the existing law in that portion of the work to which he has applied himself.

The reader will observe that in the Preface to the Eighth Edition, published in 1880, my father drew attention to alterations of the criminal law which were then pending, and in reference to which he partly re-arranged the classification of crimes, so as to bring the last Book of the Commentaries into harmony with the general structure of the proposed Code.

The events which have happened have justified the course then adopted, and though no Criminal Code has yet become law, still progress is making in that direction and on the same general lines as were indicated in the concluding Volume of the Eighth Edition.

It has not been considered expedient to delay the issue of the present Edition with the sole object of incorporating the Acts of the current Session, but the alterations in the law have throughout

been brought down to the close of the year 1882 —a date sufficiently recent, it is submitted, for the requirements of the student and general reader. Moreover, some of the subjects which have been under the consideration of Parliament during the present Session are such as could not be properly dealt with in a work on our system of law taken as a whole, until the fresh experiments made or about to be made, have by the lapse of some time and by the light afforded by experience, become ripe for didactic exposition.

HENRY ST. JAMES STEPHEN.

June, 1883.

NOTICE TO THE READER.

THE portions of these Commentaries which lie between brackets [] are taken *substantially* from Blackstone; and rest, chiefly, on his authority. To enable the reader to distinguish these portions from other parts of the work, upon merely opening the volume, and without being obliged to turn the leaves over backwards, the continuation of an extract is always marked by a new bracket at the top of the page.

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INTRODUCTION.

SECTION I.

OF THE STUDY OF THE LAW.

At the outset of a work like the present, in the course of which it is proposed (though with the aid, in part, of materials derived from a former writer) to bring under examination no less a subject than the entire body of the English law, the discouragement to which the writer is naturally inclined by the magnitude of the task before him, is counteracted by the recollection of its general interest and importance. The subject is one to which no class of readers in the realm can be indifferent; [for it is incumbent upon every man to be acquainted with those laws at least with which he is immediately concerned, lest he incur the censure, as well as the inconvenience, of living in society without knowing the obligations which it lays him under. But it ought to have peculiar attractions for men of liberal education and respectable rank. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or to themselves without some degree of knowledge in the laws. To evince this the more clearly it may not be amiss to descend to a few particulars.

Let us therefore begin with gentlemen of independent estates and fortune, the most useful as well as considerable

[body of men in the nation; whom even to suppose ignoran in this branch of learning is treated by Mr. Locke as a strange absurdity (*a*). It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few leading principles relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these, must always be of dangerous consequence to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of

(*a*) Education, Sec. 187.

[their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance for the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And when juries are incapable of doing this with tolerable propriety, it tends proportionably to lower their authority and to throw more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious: and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowledge,) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

Yet farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament; and those, who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may list under party banners; may grant or withhold supplies; may vote with or vote

[against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation; to propose, to adopt, and to cherish any solid and well-weighed improvement: bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet Cicero was of a different opinion: "it is necessary," says he, "for a senator to be thoroughly acquainted with the constitution; and this," he declares, "is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can possibly be fit for his office" (*b*).

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well

(*b*) *"Est senatori necessarium nosse rempublicam; idque late patet: — hoc omne scientiæ, diligentiæ, memoriæ est; sine quo paratus senator nullo pacto potest."* 3, 18.

[worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original, not to the common law itself, but to innovations that have been made in it by acts of parliament, "overladen (as Sir Edward Coke expresses it) with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law" (*c*). This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if," he subjoins, "acts of parliament were, after the old fashion, penned by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far former statutes had provided remedy for former mischiefs and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences and provisoes, as they do now." And if this inconvenience was so strongly felt in the reign of Elizabeth, it is easy to judge that the evil is greatly increased in our own times when our statutes have become so much more numerous and complicated.

Again, what is said of gentlemen in general, and the

(*c*) 2 Rep. Pref.

[propriety of their application to the study of the laws of their country, is equally applicable to the nobility of this realm, except only in the article of serving upon juries. On the other hand, they have peculiar provinces of far greater consequence and concern; as they are not only by birth hereditary counsellors of the crown, but are also judges upon their honour of the lives of their brother-peers (*d*).

The Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scævola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms of which his friend was obliged to make use. Upon which Mutius Scævola could not forbear to upbraid him with this memorable reproof, "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned" (*e*). This

(*d*) Blackstone here adds some further remarks on the same head, grounded on the fact of the nobility, as members of the House of Lords, being the arbiters of the property of all their fellow-subjects; and that in the last resort. "In this their judicial capacity," he proceeds, "they are bound to decide the nicest and most critical parts of the law. Their sentence is final, decisive, irrevocable. No appeal, no correction; not even a review can be had; and to their determination, whatever it may be, the inferior courts of justice must conform, otherwise the rule of justice would no longer be uniform and steady."

These observations as to the finality of the sentences of the House of Lords are still, of course, true; but, with reference to the particular subject under discussion, are now somewhat beside the purpose. Indeed, long before the alterations in the constitution of the court of ultimate appeal, effected by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59)—as to which, information will be found hereafter in its proper place in this work (vide post, bk. v. ch. VI.)—it had long ceased to be the practice for the lay lords to take any practical part in the proceedings on an appeal to the House from the decision of the other courts of justice.

(*e*) Ff. 1, 2, s. 43. "*Turpe esse patricio, et nobili, et causas oranti, in quo versaretur*

[reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law, wherein he arrived to that proficiency, that he left behind him about a hundred and four-score volumes of his own compiling upon the subject; and became, in the opinion of Cicero, a much more complete lawyer than even Mutius Scævola himself (*f*).

It will be idle to recommend to our English nobility and gentry to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator: but the inference which arises from the story is this; that ignorance of the laws of the land hath ever been esteemed dishonourable in those who are entrusted by their country to maintain, to administer, and to amend them.

Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank, especially those of the learned professions. The clergy, in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages, and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension, which is no otherwise to be acquired than by use, and a familiar acquaintance with legal writers.]

To gentlemen of the faculty of physic the study of the law is attended with some importance, not only to com-

(*f*) Brut. 41.

plete their character for general and extensive knowledge, a character which their profession has always remarkably deserved, but also to enable them to give more satisfactory evidence in a variety of cases in which they are liable to be examined as witnesses. The frequent combination of medical with legal considerations, upon inquiries relative to suspected murder or doubtful sanity, and other points of the like nature, has given birth to a sort of mixed science, known by the name of *Forensic Medicine*, or *Medical Jurisprudence*, which may be considered as common ground to the practitioners both of law and of physic.

[But those gentlemen who profess the civil and ecclesiastical laws are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. And in those cases wherein a reception has been thus allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them, or if the judges proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance both may, and frequently does, prohibit and annul their proceedings (*g*): and it will not be a sufficient excuse for them to allege that such or such a practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reason it

Hale, Hist. C. L. 2; Selden in Fletam; 5 Rep., Caudrey's case; 2 Inst. 599.

[becomes highly necessary for everyone who would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the maritime and the ecclesiastical law.]

The general use and necessity of some acquaintance with the common law being thus apparent, it may naturally be supposed that some provision would antiently have been made for this, as for other branches of education, in the universities of Oxford and Cambridge. The reverse, however, is the fact—the study of the common law having until recent times been wholly neglected in those venerable seats of learning, and having been cultivated from the earliest period in a different region. How this came to pass will appear from the following retrospect.

[Sir John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry the sixth,) puts a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning: "Why the laws of England, being so good, so fruitful, and so commodious, are not taught in the universities, as the civil and canon laws are?" (*h*). In answer to which he gave what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being, in short, that "as the proceedings at "common law were in his time carried on in three diffe- "rent tongues, the English, the Latin, and the French, "that science must be necessarily taught in those three "several languages; but that in the universities all "sciences were taught in the Latin tongue only;" and therefore he concluded "that they could not be conve- "niently taught or studied in our universities" (*i*). But without attempting to examine seriously the validity of

(*h*) C. 47. (*i*) C. 48.

[this reason, we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws was so long banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

That antient collection of unwritten maxims and customs, which is called the common law, however compounded, or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, in great measure weathered the rude shock of the Norman conquest. This endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages: it was then taught, says Mr. Selden, in the monasteries, *in the universities*, and in the families of the principal nobility (*k*). The clergy, in particular, as they then engrossed almost every other branch of learning, so (like their predecessors, the British Druids) were peculiarly remarkable for their proficiency in the study of the law (*l*). *Nullus clericus nisi causidicus*, is the character given of them soon after the Conquest, by William of Malmsbury (*m*). The judges therefore were usually created out of the sacred order (*n*), as was likewise the case among the Normans (*o*); and all the inferior offices were supplied by the lower clergy, which occasioned their successors to be denominated *clerks*, as they are to this day.

But the common law of England, being not committed to writing, but only handed down by tradition, use and

(*k*) In Fletam, 7, 7.
(*l*) Cæsar de Bello Gal. 6, 12.
(*m*) De Gest. Reg. l. 4.
(*n*) Dugdale, Orig. Jurid. c. 8.
(*o*) "*Les juges sont sages personnes et autentiques,—sicomme les archechanoines des eglises cathedraulx, et les aultres personnes qui ont dignitez en saincte eglise; les abbez, les prieurs conventuaulx, et les gouverneurs des eglises, &c.*"—Grand Coustumier, ch. 9.

[experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language.] And it was nearly brought to ruin by the new impulse given in the 12th century to the study of the system of Roman law compiled by Justinian, and its consequent reception over all the west of Europe; where, previously, it had possessed, in general, no authority, and had fallen almost into oblivion (*p*). [Hence that law became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science; and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, also adopted the civil law as the basis of their several constitutions; blending and interweaving it among their own feodal customs, in some places with a more extensive, in others with a more confined authority (*q*).

Nor was it long before the prevailing mode of the times reached England: for Theobald, a Norman abbot, being elected, in the year 1138, to the see of Canterbury, and

(*p*) Hallam's Middle Ages, 3rd vol. p. 513; 1 Bla. Com. 18; 1 Reeves, Hist. Eng. Law, p. 66. It has been said (and the opinion is adopted by Blackstone) that this revival was owing to the accidental discovery of a copy of the Pandects at the capture of Amalfi by the Pisans, about the year 1130. But there appears to be no sufficient evidence that any such discovery took place. (See Hallam, ubi sup.; and Histoire du Droit Romain au Moyen-Age, par M. De Savigny, ch. xviii. s. 35, ch. xxii. ss. 164, 167.)

(*q*) Domat's Treatise of Law, c. 13, § 9; Epistol. Innocent. IV. in M. Paris, A.D. 1254.

[being extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and, among the rest Roger, surnamed Vacarius, whom he placed in the university of Oxford to teach it to the people of this country (*r*). But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy, devoted to the will of a foreign primate, received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitutions, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation, forbidding the study of the laws then newly imported from Italy (*s*): but this, which was treated by the monks as a piece of impiety (*t*), though it prevented the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

From this time the nation seems to have been divided into two parties; on the one hand, the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil law and that of the Roman church (or canon law), which two systems now came to be inseparably interwoven with each other; and, on the other hand, the nobility and laity, who adhered with equal pertinacity to the old common law: both of them reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the

(*r*) Gervas. Dorobern. Act. Pontif. Cantuar. Col. 1665.

(*s*) Rog. Bacon, citat. per Selden in Fletam, 7, 6; in Fortesc. c. 33; and 8 Rep. Pref.

(*t*) Joan. Sarisburiens. Polycrat. 8, 22.

[spleen with which the monastic writers speak of our municipal laws upon all occasions (*u*); and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton, when the prelates endeavoured to procure an Act to declare all bastards legitimate in case the parents intermarried at any time afterwards: alleging this only reason, because holy church (that is, the canon law,) declared such children legitimate; but "all the earls and barons" (says the parliament-roll) "with one voice answered, that they would not change the laws of England, which had hitherto been used and approved" (*x*). And we find the same jealousy prevailing above a century afterwards, in the reign of Rich. II., when the nobility declared, with a kind of prophetic spirit, "that the realm of England hath never been unto this hour,—neither by the consent of our lord the king, and the lords of parliament, shall it ever be,—ruled or governed by the civil law" (*y*). And of this temper between the clergy and laity many more instances might be given.

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of King Henry the third, episcopal constitutions were published, forbidding all ecclesiastics to appear as advocates *in foro sæculari* (*z*). Nor did they long continue to act as judges there, not caring, to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm (*a*): though they still kept possession of the high

(*u*) Ibid. 5, 16; Polydor. Virgil, Hist. 1, 9.

(*x*) "*Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*" Stat. Merton, 20 Hen. 3, c. 9.

(*y*) Selden, Jan. Anglor. l. 2, § 43; in Fortesc. c. 33.

(*z*) Wilkins, Concil. vol. i. pp. 574, 599.

(*a*) Selden in Fletam, 9, 3.

[office of chancellor, and of the court of chancery attached to it, a court then of little juridical power; and afterwards, as its business increased by degrees, they modelled the process of this court at their own discretion.

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, as well as from the high court of chancery before mentioned; in all of which the proceedings were conducted in a course much conformed to the civil law; for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; Pope Innocent the fourth having forbidden the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered that our universities began about that period to receive their present form of scholastic discipline; and that they were then, and continued to be till the time of the Reformation, entirely under the influence of the popish clergy; this will lead us to perceive the reason why the study of the Roman laws was in those days of bigotry pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

And after the Reformation, many causes conspired to prevent its becoming a part of academical education: as, first, long usage and established custom, which, as in everything else, so especially in the forms of scholastic exercise, have great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though its

[equal at least, and perhaps an improvement on the other. But the principal reason of all that hindered the introduction of this branch of learning, was, that the study of the common law, being banished from our universities in the times of popery, fell into a quite different channel, and was wholly cultivated in another place.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen; who entertained upon their parts a most hearty aversion to the civil law, and made no scruple to profess their contempt, nay, even their ignorance of it, in the most public manner (*b*). But still, as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil,—a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta,—had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

The incident referred to was the fixing the Court of Common Pleas, the grand tribunal for disputes of property, to be held in one certain spot; so that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly this court, in conjunction with all the other superior courts, was held before the king's chief justiciary of England in the *aula regis*, or such of his palaces wherein his royal person resided; and removed, with his household, from one end of the kingdom to the other. This was found to occasion great inconvenience to suitors; to remedy which it was (in the thirteenth century) made an article of the great charter of liberties, both that of King John and that of King Henry the third, that "Common Pleas should no longer follow the

(*b*) Fortesc. de Laud. LL. c. 25.

[king's court, but be held in some certain place;" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman observes) addicted themselves wholly to the study of the laws of the land (*c*); and, no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, King Edward the First.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery) between the city of Westminster, (the place of holding the king's courts,) and the city of London; for advantage of ready access to the one, and plenty of provisions in the other (*d*). Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil (*e*). The degrees were those of barristers, at first styled apprentices (*apprenticii ad legem*), who answered to the bachelors: and those of serjeants (*servientes ad legem*), who answered to the doctors of the universities (*f*).

The crown seems to have soon taken under its protection this infant seminary of the common law; and, the more effectually to foster and cherish it, King Henry the third

(*c*) Glossar. 334.

(*d*) Fortesc. c. 48. The Inns of Court are the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn.

But no degree in the *canon* law is now conferred either at Oxford or Cambridge. (See Black. Com. by Christian, vol. 1, p. 392, *in notis*.)

(*f*) As to barristers and serjeants, see post, bk. v. ch. III.

[in the nineteenth year of his reign, issued out an order, directed to the Mayor and Sheriffs of London, commanding that no regent of any law schools *within* that city should, for the future, teach law therein (*g*). The word law, or *leges*, being a general term, may create some doubt, at this distance of time, whether the teaching of the civil law, or the common, or both, was thereby restrained. But in either case, it tended to the same end. If the civil law only was prohibited,—which is Mr. Selden's opinion (*h*),—it was then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law were also included in the restriction, (as Sir Edward Coke understands it, and which the words seem to import,) then the intention was evidently this,—by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university which was newly instituted in the suburbs (*i*).

In this juridical university, for such it is insisted to have been by Sir Edward Coke (*k*), there were two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying (says Fortescue) the originals, and, as it were, the elements of the law; who, profiting therein, as they grew to ripeness, were admitted into the greater inns of the same study, called the inns of court" (*l*). And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice; and that in his time there were about two thousand students at these several inns, all of whom, he informs us, were *filii nobilium*, gentlemen born.

(*g*) "*Ne aliquis scholas regens de in eadem civitate, de cætero leges doceat.*"

(*h*) In Flet. 8, 2.

(*i*) See 2 Inst. proëm.

(*k*) 3 Rep. pref.

(*l*) C. 49.

[Hence, it is evident, that though under the influence of the monks our universities neglected this study, yet in the time of Henry the sixth it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be admitted into the inns of court and chancery, there to be instructed in the originals and elements of the laws. But by degrees this custom fell into disuse; which seems principally owing to these reasons; first, because in these societies all sorts of regimen and academical superintendence, either with regard to morals or studies, were thought impracticable, and therefore entirely neglected: secondly, because persons of birth and fortune, after having finished their usual courses at the universities, had seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction.]

At the present day the inns of chancery have accordingly sunk into insignificance, and an admission to them is no longer of any avail to the student in his progress to the bar (*m*). And even the resort to the inns of court is now very much confined to those to whom the knowledge of practice is absolutely necessary, that is, such as are intended for the profession.

The inns of court still enjoy, however, their antient and exclusive privilege of conferring the rank or degree of *barrister at law;* the possession of which constitutes an indispensable qualification for practising as an advocate or counsel in the superior courts. No other means of obtaining this degree exist but that of becoming enrolled as a student in one or other of these inns (*n*), and applying,

(*m*) The Inns of Chancery are Clifford's Inn, Clement's Inn, New Inn, Staples' Inn, and Barnard's Inn. Besides these, there were formerly Furnival's Inn, the Strand Inn, Lyon's Inn, and Thavie's Inn. As to Inns of Chancery, see Rex *v.* Barnard's Inn, 6 Ad. & El. 17, and the Report of the Commissioners appointed to inquire into their constitution, which was presented to Parliament in the year 1855.

(*n*) The candidate for admission as a student, unless he shall have passed a public examination at some university within the British

after a certain period, to its principal officers (or *benchers*) for a *call to the bar* (*o*). As a qualification for the call, the student must (as the general rule) have kept commons for three years (i. e. twelve terms), by dining in the hall of the society into which he has obtained admission, at least six times in each term. If he be, at the same time, a member of one of the universities of Oxford, Cambridge, Dublin, London, Durham, St. Andrews, Aberdeen, Glasgow, Edinburgh, or of the Queen's university in Ireland, *three* days in each term are sufficient (*p*); and by the present educational system it is further provided, that no student shall be called to the bar unless he shall, to the satisfaction of the Council of Legal Education, have passed a public examination, for the purpose of ascertaining his fitness to be so called, and have obtained from the said council a certificate of having satisfactorily passed such examination. And, accordingly, a public examination, for all the inns collectively, periodically takes place, extending to all students who are desirous of submitting themselves to that test of proficiency (*q*). It

dominions, must pass a preliminary examination testing his knowledge of the English and Latin languages, and of English history. (See Consol. Reg., Dec. 1875.) As to the relation which exists between the Inns of Court and those who have become members, see Neate *v.* Denman, Law Rep., 18 Eq. Cas. 127.

(*o*) An appeal from the decision of the benchers as to calling to the bar or disbarring, lies to the judges in their capacity of *visitors*. (See The King *v.* Lincoln's Inn, 4 B. & C. 855.)

(*p*) Consol. Reg., Dec. 1875.

(*q*) Ibid. For the purpose of affording to students the means of obtaining instruction and guidance in their legal studies, Professors are appointed (by a joint council of the Four Inns) of Jurisprudence, of Common Law, of Equity, and of the Law of Real and Personal Property. And no student admitted after the 31st December, 1872, shall receive a certificate of fitness to be called to the bar unless he shall have passed a satisfactory examination "in the Roman Civil Law, in the Law of Real and Personal Property, and also in Common Law and Equity."

It may be observed, further, that legal education is also conducted in private channels; it being very usual for the student to obtain admission as a pupil to the chambers of a barrister, whereby he has opportunities of observing the

is further to be observed that academical instruction in the principles of the law of England may be obtained in other schools than those of the inns of court; and though no provision for instruction in such law was antiently made, as we have seen, at either Oxford or Cambridge, that deficiency has been long since redressed by the munificence of private donors, who at each of these universities have founded professorships, with appropriate endowments for that purpose (*r*).

course of actual practice, as well as the advantage of tuition in the principles of law.

(*r*) There are also professorships of law founded at the London University, and in those of Scotland and Ireland.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

the term Laws it is here intended to denote the rules of human action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence inevitably obliges the inferior to take the will of him on whom he depends, as the rule of his conduct; not, indeed, in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will.

This will of his Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to

[discover the purport of those laws. Such, among others, are these principles—that we should live reputably, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law (*a*).]

The constitution and frame of humanity are in this respect, as in all others, so contrived as to afford a striking proof of the benevolence of the great Creator. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human felicity, we ought to consider the law of nature not as made up of a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, —but as graciously reduced to this one paternal precept, "that man should pursue his own true and substantial happiness." [This is the foundation of what we call ethics, or natural law; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man's real happiness, and therefore concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.]

But though the real basis of the law of nature is a tendency to promote human happiness, and though to a certain extent this consideration affords a practical test, whether a given course of conduct be naturally right or not, yet the fallibility of human reason, and its inability to judge of the ultimate consequences of things, will in general preclude the application of such a test to particular

(*a*) "*Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.*"—Inst. l. 1, 3. The word *honeste* in this passage has been rendered by Blackstone, vol. i. p. 40, *honestly*, which scarcely conveys the full meaning.

cases. It would seem not to have been the design of the all-wise disposer of the universe that man, even in his perfect state, should be left wholly to the guidance of his own understanding or conscience on the subject of moral duty; but it is at all events certain that, since the Fall, his corrupt and clouded faculties have proved unequal to the task.

[Ample light, however, is now afforded to him by the benign interposition of divine Providence; which, in compassion to the frailty, the imperfection and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As, then, the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself, the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points

[in which both the divine law and the natural law leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the divine law. To instance the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural, law; and, from these prohibitions, arises the chief unlawfulness of this crime. Those human laws by which it is also interdicted, add comparatively but little to its moral guilt, or to the duty *in foro conscientiæ* of abstaining from its perpetration. Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as the importation of particular commodities from foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

But we are further to observe that man was formed for society; and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor indeed has the courage to do it (*b*). However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts,

(*b*) Puffendorf, l. 7, c. 1, compared with Barbeyrac's Commentary.

[treaties, leagues, and agreements between these several communities; in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject: and therefore the civil law very justly observes, that *quod naturalis ratio inter homines constituit, vocatur jus gentium* (*c*).

Thus much it appeared necessary to premise concerning the law of nature, the revealed law, and the law of nations, before a more full exposition was given of the principal subject of this section, municipal law; that is, the rule by which particular districts, communities, or nations, are governed. It is here called *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

The true meaning and force of the term (taken in this its ordinary sense) may be more fully developed thus; it is "a rule of civil conduct prescribed by the supreme power in a state" (*d*).

Let us endeavour to explain its several properties, as they arise out of this definition. And, first, it is a *rule*: not a transient particular order from a superior to or concerning a particular person; but something permanent, uniform and universal (*e*). Therefore a particular Act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this Act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an

(*c*) Ff. l. 1, 9.

(*d*) "*Jus civile est quod quisque sibi populus constituit.*"—Inst. l. 2, 1.

(*e*) An order affecting certain individuals only was, by the Roman jurists, termed *privilegium*. See Austin on Jurisprudence, vol. i. p. 13.

[Act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a rule. It is also called a rule, to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule, to distinguish it from a *compact* or *agreement;* for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "*a rule.*"

Municipal law is also "a rule *of civil conduct.*" This distinguishes municipal law from the natural, or revealed, the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "a rule *prescribed.*" Because a bare re-

[solution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law; it is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *vivâ voce*, by officers appointed to proclaim the law which has been made. It may, lastly, be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the people. There is a still more unreasonable method than this, which is called the making of laws *ex post facto;* when, after an action (indifferent in itself) is committed, the legislator then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct

by the supreme power in a state." For legislature is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural and inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society; and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its

[formal beginning from any convention of individuals, tuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement, of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together; namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guarantee to each individual member the enjoyment of certain liberties and advantages or (as they are generally termed) *rights*, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all, it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in those persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the

Supreme Being; the three grand requisites, that is to say, of wisdom, of goodness, and of power; wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not intended here to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy—wisdom, goodness, and power—are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form

administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue or goodness of intention is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together, and united in the hand of the prince: but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the antients, it was observed, had in general no idea of any other permanent form of government but these three; for though Cicero declares himself of opinion "*esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa*" (*f*); yet Tacitus treats this notion of a

(*f*) In his fragments De Rep. l. 2.

[mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure (*g*).

But, happily for us of this island, the British constitution has long remained (and may it long continue!) a standing exception to the truth of this observation. For as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the sovereign; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and, thirdly, the House of Commons, freely chosen by the people from among themselves, which makes it a kind of democracy; and as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy: and so want two of the three

(*g*) "*Cunctas nationes et urbes populus, aut primores, aut singuli regunt: delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest.*"—Ann. lib. iv. c. 33.

[principal ingredients of good polity; that is, virtue, wisdom, and power. If it were lodged in any two of the branches—for instance, in the sovereign and House of Lords—our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the sovereign and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the crown had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative or perhaps to abolish the royal office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that which (upon the supposition of an original contract, either actual or implied,) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is, according to Mr. Locke, (who perhaps carries his theory too far,) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power (*h*).

Having thus cursorily considered the three usual species of government, and our own singular constitution selected and compounded from them all, we are now to remark that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state

(*h*) On Government, part 2, § 212.

[resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* And this may be discovered from the very end and institution of states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce one uniform will of the whole. It can therefore be no otherwise produced than by a political union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law.*

Thus far, as to the right of the supreme power in a state to make laws; but farther, it is its duty likewise. For since the respective members are bound to conform themselves to its will, it is expedient that they receive directions from the state declaratory of that will. But as it is impossible in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of

[those rights which the state assigns him, in order to promote and secure the public tranquillity.

Municipal law, in a general point of view, may be said to consist of several parts: one, *declaratory;* whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another *directory;* whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial;* whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added—in case of a law by which any public wrong is prohibited, or public duty enjoined—a fourth, viz., the part which contains the *sanction*, that is, the provision for enforcing or promoting its observance.

With regard to the first of these, the *declaratory* part of municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights then which may be called natural rights, such as life and liberty, need not the aid of human laws to be effectually invested in every man; neither do they receive any material increase of strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature can justifiably abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do natural duties (such, for instance, as the worship of God, the maintenance of children, and the like) receive a much stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes *mala in se*, such as murder, theft, and perjury; which contract but little additional turpitude from being declared unlawful by the legislature of a state. For that legislature in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the

[municipal law, has very little force or operation with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties,—obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees, they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of municipal law: and the *directory* stands much upon the same footing: for this virtually includes the former, the declaration being usually collected from the direction. The law that says "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said, "that

[the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the directory part has "forbidden any one to enter on another's property without the leave of the owner:" if Gaius after this will presume to take possession of the land, the remedial part of the law will then interpose its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws it is observed, that human legislators have for the most part chosen to make it rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards; because, also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty; and farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good (*i*). For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

Laws attended with a vindicatory sanction are said to *compel* and *oblige:* not that by any natural violence they so constrain a man, as to render it impossible for him to

(*i*) Locke on the Human Understanding, b. 2, c. 21.

[act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only *persuade* and *allure;* nothing is *compulsory* but punishment.]

It is held by the soundest ethical writers, that there is also an obligation in point of conscience to observe the laws. It is related of Socrates that he made a promise with himself to observe the laws of his country: and this is nothing more than what every man ought both to promise and perform; and he ought also to promise that he will exert all his power to compel others to obey them (*k*). It has, indeed, been argued that this principle must be understood with some restriction, and that though it holds as to rights determined by law to exist, as to natural duties, and as to offences *mala in se*, yet that, with regard to those laws which enjoin only *positive* duties, or forbid things not *mala in se*, but *prohibita* merely, without any intermixture of moral guilt, conscience is no further concerned than by directing a submission to the penalty imposed for a breach of those laws (*l*). The distinction, however, will perhaps hardly bear the test of a close inquiry. To form a true judgment on the subject, it is necessary to take into consideration that the true principle both of moral and of positive laws is in effect the same, viz. utility, or the general welfare, and that disobedience to either sort of precept must be presumed to involve in it some kind of mischievous consequence. Supposing the existence of a law of the merely positive

(*k*) Note by Christian, to 1 Bl. Com. p. 59.

(*l*) 1 Bl. Com. 58.

class, which happens to be considered by the public at large as useless or even detrimental to society, yet a conscientious man will feel himself bound to observe it, if for no other reason, yet for this, that his taking the contrary course might encourage others to violate laws of a more beneficial character, and lessen the general reverence for the institutions of his country.

SECTION III.

OF THE LAWS OF ENGLAND.

Our plan now leads us to investigate the different parts of the laws of England; but before commencing this subject, connected as it is to some extent with the civil and canon laws, a general account of what is meant by those laws may be here desirable.

[By the *civil* law is generally understood the municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digests of the Emperor Justinian, and the Novel Constitutions of himself and some of his successors; and of this body of law the following is a short and general account (*a*).

The Roman laws—founded, first upon the regal constitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors,—had grown to so great a bulk, or, as Livy expresses it, "*tam immensus aliarum super alias acervatarum legum cumulus*" (*b*), that they were computed to be many camels' load, by an author who preceded Justinian (*c*). This was in part remedied by the col-

(*a*) Ample information on this subject will be found in Vinnius on the Institutes, Voet on the Pandects, Perezius on the Code, and in the works of Bynkershoeck, Heineccius, and Pothier; and their researches have been followed up by numerous writers, amongst whom we will content ourselves with mentioning the names of Kent and Savigny.

(*b*) L. 3, c. 34.

(*c*) See Taylor's Elements of Civil Law, 17.

[lections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the Emperor Theodosius the younger, by whose orders a code was compiled A.D. 438, being a methodical collection of all the imperial constitutions then in force; which Theodosian code was the only book of civil law received as authentic in the western part of Europe till many centuries after (*d*); and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms: for Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1, The Institutes, which contain the elements or first principles of the Roman law, in four books (*e*). 2. The Digests, or Pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A New Code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect (*f*). 4. The novels, or new constitutions posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise

(*d*) This is at least true of the western part of Europe generally, as the code of Justinian was not recognized there generally till the twelfth century. But that code seems to have been recognized by the Roman Church, at least, much earlier. See Hallam's Mid. Ag. vol. iii. p. 513; and "Histoire du Droit Romain au Moyen-Age, par M. de Savigny," ch. xxii. ss. 164, 167.

(*e*) The Institutes of Justinian are chiefly founded on those of Gaius, and on the Fragments of Ulpian. The manuscript of Gaius was discovered accidentally by Niebuhr, in the year 1816, while at work in the library at Verona.

(*f*) It is called the "New Code," not in reference to the Theodosian code, but to a code which was promulgated by Justinian, but suppressed by him on the publication of the New Code.

(*g*) It is remarked by Lord Mackenzie in his studies on Roman Law (p. 25), that Justinian himself is the author of most of the Novels, viz., of 154 out of 168.

These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which, however, fell soon into neglect and oblivion, until, in the twelfth century, the policy of the Roman ecclesiastics began to give new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

[The *canon* law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over (*i*) This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see; all which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, Gratian, an Italian monk, in imitation of Justinian's Pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani* (*k*). These reached as low as the time of Pope Alexander the third. The subsequent papal decrees, to the pontificate of Gregory the ninth, were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface the eighth about the year 1298, which is called *Sextus Decretalium*. The Clementine constitutions, or decrees of Clement the fifth, were in like manner authenticated in 1317 by his successor John the twenty-second, who also published twenty constitutions of his own,

(*i*) A disquisition on this subject, including our national canon law, will be found in Reeves's Hist. Eng. Law, 4th vol. chapters xxiv., xxv.; and see Robertson's Chas. V. vol. i. n. 24.

(*k*) It is said by Dr. Burn, in the Preface to his "Ecclesiastical Law," p. xx., that the "decrees" of the canon law, having first been collected by *Ivo* in the year 1114, were afterwards "polished and perfected by Gratian, a monk of Bononia, in the year 1149."

[called the *Extravagantes Joannis;* all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes:* and all these together, Gratian's Decree, Gregory's Decretals, the Sixth Decretal, the Clementine Constitutions, and the Extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of our own church and kingdom (*l*). The *legatine* constitutions are ecclesiastical laws, enacted in *national* synods held under the Cardinals Otho and Othobon, legates from Pope Gregory the ninth and Pope Clement the fourth, in the reign of king Henry the third, about the years 1220 and 1268 (*m*). The *provincial* constitutions are principally the decrees of *provincial* synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry the third, to Henry Chichele, in the reign of Henry the fifth; and adopted also by the province of York in the reign of Henry the sixth (*n*). At the dawn of the Reformation, it was enacted by statute 25 Hen. VIII. c. 19, that a review should be had of the canon law; and, that till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made and not repugnant to the law of the land or the king's prerogative, should still be used and executed (*o*).]

(*l*) See Hist. Eng. Law, by Reeves, vol. ii. p. 78.

(*m*) On these constitutions Athon is the chief commentator. See Pref. to Burn's Ecclesiastical Law, p. xxii.

(*n*) Ibid. Lyndwode's Provinciale is the chief work of authority on the provincial constitutions. (See Reeves, vol. iv. p. 117.)

(*o*) See also three temporary statutes to the same effect, viz., 27 Hen. 8, c. 15; 35 Hen. 8, c. 16, and 3 & 4 Edw. 6, c. 11. The 25 Hen. 8, c. 19, was revived and confirmed by 1 Eliz. c. 1.

And, as no such review has yet been perfected (*p*), it would seem that upon this enactment depends the authority of the canon law in England, the limitations of which appear upon the whole to be as follows,—that no canon contrary to the common or statute law, or the prerogative royal, is of any validity; that, subject to this condition, the canons made anterior to the parliamentary provision above mentioned, and adopted into our system (for there are some which have had no reception among us), are binding both on clergy and laity; but that canons made since that period, as they have had no sanction from parliament, are, as regards the laity at least, of no force (*q*).

[Accordingly, with regard to those canons in particular which were enacted by the clergy in convocation under James the first, in the year 1603, and which were never confirmed in parliament, but sanctioned by the king's charter only (*r*), it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may be bound to pay them (*s*).]

To proceed, then, to the subject now before us, we

(*p*) See Watson's Cl. Law, ch. iii. p. 17, 3rd ed.; Burnet's Hist. Reform. vol. ii. p. 197; Adams' Relig. World, vol. i. p. 411.

(*q*) See Caudrey's case, 5 Rep. xxxii.; 12 Rep. 72; Co. Litt. 344 a; Pref. to Burn's Ecc. Law; Wolferstan *v.* Bishop of Lincoln, 2 Wils. 174; Middleton *v.* Croft, Stra. 1056; 2 Atk. 659, 669; Alston *v.* Atlay, 7 Ad. & El. 289.

(*r*) Middleton *v.* Croft, ubi sup. These are 141 in number, and are a collection out of the several preceding canons. They are intituled "Constitutions and Canons Ecclesiastical treated upon by the Bishop of London, President of the Convocation, &c., and agreed upon with the King's Majesty's Licence, in their Synod begun at London, A.D. 1603, in the first year of King James." They constitute the present standard of the Church of England.

(*s*) See Middleton *v.* Croft, ubi sup.; More *v.* More, 2 Atk. 158; Bishop of St. David's *v.* Lucy, Carth. 485; Rex *v.* Bishop of Lichfield, 2 W. Bla. 968; Marshall *v.* Bishop of Exeter, Law Rep., 3 H. of L. Cas. 17.

may, for our present purpose, divide the "municipal law of England," or the rule of civil conduct prescribed to the inhabitants of this kingdom, into two kinds: the *lex non scripta*, the unwritten (or common) law; and the *lex scripta*, the written (or statute) law.

[With regard to our "unwritten" law, it is not, however, to be understood that the whole of it is at present merely *oral*, or communicated to us from the former ages to the present solely by word of mouth. It is true, indeed, that in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional; for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory (*t*); and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges solâ memoriâ et usu retinebant* (*u*). But with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. And these parts of our law are styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are; but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

Our antient lawyers, and particularly Fortescue (*x*), insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some; but the assertion (as observed by Selden) must be understood with many grains

(*t*) Cæs. de B. G. lib. 6, c. 13.
(*u*) Spelm. Gl. 362.
(*x*) C. 17.

[of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless the Romans, the Picts, the Saxons, the Danes, and the Normans, must have insensibly introduced and incorporated many of their own customs with those that were before established (*y*); thereby, in all probability, improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon, are mixed as our language (*z*); and as our language is so much the richer, the laws are the more complete.

And indeed our early historians do positively assure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile a *Dom-boc* or *Liber Judicialis*, digesting them into one uniform code of laws for the general use of the whole kingdom; and this book is said to have been extant so late as the reign of king Edward the fourth, but to have been since lost; it probably contained the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings (*a*).

The irruption and establishment of the Danes in England, which followed soon after, introduced new customs,

(*y*) Mr. Spence, in his "*History of the Equitable Jurisdiction of the Court of Chancery*," insists that the most important part of the common law is a legacy from the Romans.

(*z*) See his proposals for a digest.

(*a*) 1 Bl. Com. 65. In the opinion, however, of Mr. Hallam (Midd. Ages, vol. ii. p. 402, 7th ed.) there is no sufficient proof that Alfred "compiled a *dom-boc*, or general code for the government of his kingdom." Turner (in his Hist. Ang.-Sax. vol. ii. p. 149, 6th ed.) considers the *dom-boc* as the same with the laws of Alfred, in the Leges Anglo-Sax. published by Wilkins. A document called "*Alfred's Dooms*," was printed by the Record Commissioners in 1840, but Sir F. Palgrave remarks, that it is insufficient to support the assertions of Blackstone as to Alfred's achievements as a law compiler (Rise, &c. of the British Commonwealth, c. 11).

[and caused this code of Alfred in many provinces to fall into disuse, or at least to be mixed and debased with other laws of a coarser alloy; so that about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts: 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the antient Britons; and which were therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon Lage*, or laws of the West-Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned; being the municipal law of far the most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, which was principally maintained in the rest of the midland counties, and also on the eastern coast, (the part most exposed to the visits of the Danes,) the very northern provinces being at that time under a distinct government (*b*).

Out of these three systems of laws, Roger Hoveden and Ranulphus Cestrensis inform us, that king Edward the Confessor extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom; though the work had also been projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces governed by peculiar customs (*c*). However, these undertakings of

(*b*) 1 Bl. Com. 65. For this he cites Sir M. Hale, Hist. C. L. c. 3.

(*c*) Blackstone (vol. i. p. 66) instances the Portuguese code completed in the fifteenth century, the Spanish code entitled *Las Partidas*, collected by Alonzo the tenth, in the year 1250, and the collection of the *land's lagh* in Sweden made about the same period, and he cites Mod. Un. Hist. xx. 211; xxii. 135; xxxiii. 21, 58.

[king Edgar and Edward the Confessor were probably no more than a new edition, or fresh promulgation, of Alfred's code or Dom-boc, with such additions and improvements as the experience of a century and a half had suggested. For Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the Confessor is the *restitutor*.]

But whatever may be thought of these points of legal history or tradition, there can be no doubt that, under the first princes of the Norman line, our ancestors were engaged in a frequent struggle to maintain certain institutions known by the appellation of the "laws of Edward the Confessor," and which would seem to have been a body of laws or customs observed (though not first established) in the reign of that monarch (*d*); and it is certain that the Norman princes made frequent engagements to restore and maintain these laws as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. Nor is it unreasonable to believe that these, or some other remains of the law established in this country before the Conquest, gave rise (in part at least) to that collection of maxims and customs which is now known by the name of the common law (*e*); a name either given to it in contradistinction to other laws,—as the statute law, the civil law, the law merchant, and the like—or more probably, as a law common to all the realm.

To assign however to the common law no other original than this, would be to take an imperfect and erroneous view of the subject. Our system of tenures was chiefly

(*d*) The laws so called, contained in Lambard and Wilkins, are considered spurious. (See Hallam's Midd. Ages, vol. ii. p. 444, 7th edit.)

(*e*) That much of our common law was in force in this island before the Conquest is maintained both by Hale and Blackstone. And the historian of the Middle Ages, though inclined in general to ascribe our common law to a date not much antecedent to the publication of Glanville (temp. Hen. 2), yet admits that "some features of it "may be distinguishable in Saxon "times." (Hallam, ubi sup., pp. 466, 468, 7th ed.)

constructed, if not first founded, by the Norman conqueror (*f*); our antient judicial forms and pleadings, while they have nothing in common with the Anglo-Saxon style, are in striking conformity with the Norman; and it has been remarked with great truth, that the general language of our jurisprudence and its terms of art are exclusively of French extraction (*g*). We cannot hesitate therefore to recognize in the antient law of Normandy another parent of the common law, and one from which it has inherited some of its most remarkable features (*h*).

But though these are the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of a higher antiquity than memory or history can reach (*i*): nothing being more difficult than to ascertain the precise beginning and first spring of an antient and long-established custom. For which reason it is that, in our law, the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, "time whereof the memory of man runneth not to the contrary,"

(*f*) 2 Bl. Com. 48; Henry, Hist. of Eng. vol. vi. pp. 10, 18; Hist. Eng. Law, by Reeves, vol. i. p. 28, 3rd edit.; Hallam's Midd. Ages, vol. ii. p. 408.

(*g*) "*Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua habent affine.*"—Craig, Jus Feud. lib. i. s. 7.

(*h*) The similarity of the English and Norman Laws is strongly illustrated by a comparison of the Grand Coustumier of Normandy (compiled as late as Ric. I. and probably later), with our Glanville, who wrote in the reign of Hen. II. This subject is discussed by Hale in Hist. C. L. c. 6, who, jealous for the originality of the English law, argues from the posteriority in date of the Grand Coustumier, that, in most of the particulars where the conformity is to be traced, the merit of the first introduction presumably belongs to England, though he admits the reasonableness of assigning it in others to Normandy. It does not, however, seem very material in which of the two countries they were first established. They have at all events no resemblance to the Anglo-Saxon institutions, and are evidently due to lawyers of the Norman School.

Hale, ubi sup. c. 3.

a phrase which refers, however, (it is to be observed,) in our law to a fixed era, and means that the custom must appear (for anything that can be proved to the contrary) to have been in use before the commencement of the reign of Richard the first (*k*). It is this antiquity that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

It has already been remarked that the Romans are amongst the many founders of our common law, by the gradual incorporation of their own customs with those they found established here (*l*); but besides this, there are subjects,—viz. matters maritime and such as relate to the Church (*m*),—with regard to which some of the principles of the civil and canon law, have been introduced into the law administered by those of our courts which have jurisdiction to entertain such matters. As to the former of these subjects, the distinction which exists between proceedings *in personam* and proceedings *in rem* will serve to illustrate our meaning. For in case of a collision between two vessels on inland waters, all that the owner of the one can do is to sue the owner of the other and recover damages for the injury he has suffered. But if the collision took place on the "high seas" over which the Admiralty jurisdiction extends, the owner of the injured vessel might (by a procedure borrowed from the civil law) sue the vessel in fault, cause it to be arrested, and unless released on bail, sell it to satisfy his judgment (*n*). Thus, also,—in matters relating to the Church,—the ecclesiastical courts may in certain cases pronounce sentence of *excommunication*, a

See the preamble to stat. 2 & 3 Will. 4, c. 71; Co. Lit. 116 a; Jenkins *v.* Harvey, 5 Tyrw. 396.

(*l*) Vide sup. p. 46.

(*m*) Blackstone (vol. i. p. 83) refers also to the *military* and the *university* courts. The former are out of use. As to the latter, see 25 & 26 Vict. c. 26, s. 12, and University Commission Report, p. 5.

(*n*) See Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), App. A. No. 4, "Writ of Admiralty action *in rem*."

power derived from the canon law and still exercisable under proper restrictions as defined by statute (*o*).

[It is further to be observed that those portions of the civil and canon law which thus, in the sense above explained, form part of our own, are properly ranked under the head of *leges non scriptæ* or unwritten laws, although (as we have seen) they are set forth by authority in pandects, codes, and institutions, and are enforced by an immense number of expositions, decisions and treatises of the learned in both branches of the law. But it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors, were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here; for the legislature of England doth not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom, or as having the right to give law to any, the meanest of its subjects. But all the strength that either the papal or imperial laws have obtained in this realm is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts, where they form a branch of the *leges non scriptæ*, or customary laws; or else because they are in some other cases introduced by consent of parliament; and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21, addressed to the king's royal majesty: "For this your grace's realm, recognizing no superior "under God but only your grace, hath been and is free "from subjection to any man's laws, but only to such as "have been devised, made, and ordained *within* this realm,

(*o*) See 53 Geo. 3, c. 127.

["for the wealth of the same; or to such other as, by "sufferance of your grace and your progenitors, the people "of this your realm have taken at their free liberty, by "their own consent, to be used among them; and have "bound themselves by long use and custom to the ob- "servance of the same; not as to the observance of the "laws of any foreign prince, potentate, or prelate; but as to "the *accustomed* and antient laws of this realm, originally "established as laws of the same, by the said sufferance, "consents, and custom; and none otherwise."]

Our unwritten or common law is distinguishable into I. General customs, which are the universal rule of the whole kingdom; and II. Particular customs, which affect only the inhabitants of particular districts.

I. [As to general customs, or the common law, properly so called, this is that law by which proceedings and determinations in the courts of justice are principally guided and directed; this, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligations of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies for civil injuries; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires (*p*). Thus, for example, that the eldest son alone is heir to his ancestor;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—these, and many others which might be instanced, are doctrines that are not set down in any written statute or ordinance; but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: viz., established *customs;* and

(*p*) Hale's Hist. C. L. c. 2.

[established *maxims*. But these appear to be one and the same thing. For the authority of these maxims (such, for example, as "the king can do no wrong," "no man shall be bound to accuse himself," and the like) rests entirely upon general reception and usage: and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.

But here a very natural, and very material, question arises: how are these general customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges of the land. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue mentions (*q*); and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a general custom as shall form a part of the common law. The judgment itself, and all the material, *i. e.* formal proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose (*r*); and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance (*s*). And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who

Cap. 8.

(*r*) As to records, see Co. Lit. 260 a, and the note by Mr. Hargreave. By stat. 1 & 2 Vict. c. 94, and 12 & 13 Vict. c. 101, s. 16, the public records of the kingdom are placed under the superintendence of the Master of the Rolls for the time being, and a public Record Office has been established.

(*s*) Marshall *v.* Berridge, 19 Ch. Div. 233.

[were held to be "*legibus patriæ optime instituti*" (*t*), while at the same time it has been uniformly considered to be the duty of those who administer the law, to conform to the precedents thus established. For the scale of justice is not intended to waver with every new judge's opinion (which would be productive of intolerable inconvenience), but when in any case the law has been solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law but to maintain and expound the old one. Yet a single determination is not sufficient to establish an inflexible rule—more particularly where it is opposed to reason or natural justice. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined. And here we may observe that our lawyers have been always copious in their encomiums on the reason of the common law; their doctrine being that law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. In accordance with which, a presumption always obtains in favour of an antient and established rule, the reason of which cannot at this distance of time be precisely assigned, that it is really founded on just and solid views. And in fact it hath been an antient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been

(*t*) Seld. Review of Tith. c. 8.

[wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.]

It is to be observed, however, that many specific questions are perpetually occurring, in which the rule of the common law does not happen to be fixed by any known decision, and that these are disposed of by the judges in the manner that they think most conformable to the received rule in other analogous cases; or if there be no such analogy to guide them, then according to the natural reason of the thing; though (in deference to the principle already referred to, that the opinion of the judge is not to make the law, but only to ascertain it), their determination always purports to be declaratory of what the law *is*, and not of what it *ought* to be. It is obvious that, owing to the infinite variety of combinations in human affairs, questions of this novel description must frequently arise under every system of jurisprudence, with whatever prospective sagacity it may attempt to guard against them,—as in cases which turn on the exposition of the meaning of particular clauses in deeds or wills; and it is remarked by Sir Matthew Hale that they are much better dealt with by a judge, than they could be by a merely learned or wise man not belonging to the profession of the law, who might be incompetent to understand even the technical terms employed in the instrument to be expounded, and at all events would be unable to reason from the analogy of other decided cases (*u*). To which it may be added, that, even in such of those questions as depend on reason only, the habit of solving them has an obvious tendency to improve the faculty, and to give the judge a great advantage over any person possessed of the same natural abilities, but not accustomed to exercise them in the same manner.

[The decisions of the courts, being the best evidence of

u) Hist. C. L. c. 4.

[what the common law is, are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *Reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, (which are preserved at large in the record,) the arguments on both sides, and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The Reports are extant in a regular series from the reign of King Edward the second to that of Henry the eighth inclusive: and were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*; whence they are known under the denomination of the *Year Books* (*x*).] In the reign of the latter monarch, however, this series closed; and though afterwards King James the first, at the instance of Lord Bacon, appointed two reporters with a handsome stipend to perform the same duty, that institution was soon neglected (*y*); and from the reign of Henry the eighth the task of communicating to the public the decisions of the courts has been executed by private hands (*z*). Some of the most valuable of the more antient reports are those by Lord

The "Year Books" commence with the twentieth year of Edw. I. A.D. 1292.

(*y*) 1 Bla. Com. p. 72. In James the second's time an order was issued to the Stationers' Company, to the effect that all books concerning the common laws of the realm were to be *licensed* by the Lord Chancellor or the judges or one of them. (See 1 Ld. Raym. 537; Burr. pref.) But the judges afterwards came to a resolution to grant licences no longer.

(*z*) It may be here remarked that at the present time there are three series of reports of the current decisions of the courts issued to the public, known respectively as the "Law Times Reports," the "Law Journal Reports," and "The Law Reports." The reports last named are published for the Incorporated Council of Law Reporting for England and Wales, established in the year 1866.

Chief Justice Coke (*a*); a man of infinite learning in his fession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name (*b*). He had been preceded as a reporter by Dyer and Plowden, both lawyers of the highest eminence: of his successors (too numerous, especially in our own days, for distinct notice,) we will only mention the more antient and distinguished names of Hobart, Croke, Yelverton, Saunders, Vaughan and Levinz (*c*).

Besides the reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanville and Bracton, who in the reigns of Henry the second and Henry the third respectively wrote treatises on the Law of England; the author of Fleta, who composed a work on the same subject in the time of Edward the first (*d*); the author of the

(*a*) The first eleven parts only were published in Coke's lifetime, at various periods between 1600 and 1615;—the twelfth and thirteenth being posthumous.

(*b*) His reports, for instance, are styled, κατ' ἐξοχήν, "the Reports," and in quoting them, we usually say, 1 or 2 Rep., not 1 or 2 Coke's Rep. as in citing other authors. The Reports of Judge Croke are also cited in a peculiar manner, by the names of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.* Queen Elizabeth, King James and King Charles the first; as well as by the number of each volume. For sometimes we call them 1, 2 and 3 Cro., but more commonly Cro. Eliz., Cro. Jac. and Cro. Car.

(*c*) The reports of Saunders were edited in 1799 by Mr. Serjeant Williams, a profound lawyer, who appended to them notes (or rather legal dissertations) of a very instructive character. His edition was afterwards republished by Sir John Patteson and Sir E. V. Williams (then both at the bar) as joint editors, and still more recently by Sir E. V. Williams alone, before his elevation to the bench; and these editors added excellent annotations of their own to the former stock.

(*d*) The author is unknown; the title of the work is derived from its being written during the author's confinement in the Fleet prison. Reeves's Hist. Eng. Law, vol. ii. p. 280. The work of Reeves just referred to (a production of our own times) is itself of high character, but less read perhaps than it deserves. Though its method is somewhat

Mirror, a work generally ascribed to the reign of Edward the second (*e*); Fortescue, who wrote De Laudibus Legum Angliæ in the reign of Henry the sixth; St. German, who composed the treatise on the grounds of the laws of England called the Doctor and Student, in the reign of Henry the eighth; Staundforde, whose work on the criminal law was published about the time of Philip and Mary, and who was followed in that track by Hale and Hawkins early in the last century; the author of Sheppard's Touchstone, who wrote on conveyances in the reign of James the first (*f*); Fitzherbert, Brooke and Rolle, who published abridgments or digests of the different titles of the law in the reigns of Henry the eighth, Elizabeth, and Charles the second respectively, and whom Viner, Comyns and Bacon afterwards succeeded (*g*); and Gilbert, among whose valuable works (the productions of the last century), we shall only mention the treatise on tenures and that on uses and trusts (*h*). These and many other methodical writers are of high and intrinsic authority in the courts of justice: but none of the class shines so conspicuously as the learned judge before mentioned, Sir Edward Coke; who in the year 1628 published four volumes of Institutes, as he is pleased to call them, though

dry, its research and accuracy are exemplary; and a continuation of it to the present day (if executed with equal ability) would be of great service to every student of law or constitutional history.

(*e*) The authorship and even the date of this treatise, "The Mirror of Justices," is uncertain. Some have pronounced it older than the Conquest, but it bears internal evidence of at least having been adapted to the time of Edward the second. (See Reeves's Hist. Eng. Law, vol. ii. p. 358.) It is stated by Turner (Hist. Ang. Sax. b. i. c. 3) to have been written by Andrew Horne, temp. Edw. 2.

(*f*) The work has been attributed to Doderidge, a judge of great eminence. See Pref. to Hilliard's edition.

(*g*) See Mr. Hargrave's eulogium on Viner's Abridgment, and Comyns' Digest, Co. Litt. 9 a, n. (3), 17 a, n. (1).

(*h*) Chief Baron Gilbert's treatises were all published after the author's death, and in an unfinished state; but they are of a most learned and useful character. As to his treatise on tenures, see Butler's Pref. to Co. Litt.

they have little of the institutional method to warrant such a title (*i*). [The first volume is a very extensive comment upon an excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the antient reports and year books, but greatly defective in method (*k*). The second volume is a comment upon many old acts of parliament, without any systematical order; the third is a more methodical treatise on the pleas of the crown; and the fourth is an account of the several species of courts (*l*).

And thus much for the first ground and chief corner-stone of the laws of England; which is general immemorial custom, or common law, from time to time declared in the decisions of the courts: which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

If we turn for a moment to the law of Rome, from which, as already hinted, so much of our own has been drawn, we shall find that, though not to the extent which prevails in our system, it still, as practised in the times of its liberty, paid a great regard to custom, adopting it, when the written law was deficient, for reasons which will fully justify our practice of making it of equal authority with, when it is not contradicted by, the written law; "for since (says Julianus, in the Digest,) the written law "binds us for no other reason but because it is approved "by the judgment of the people, therefore those laws which

(*i*) See Butler's Pref. to Co. Litt., where the reader will find some valuable observations on the celebrated commentary on Littleton, of which the First Institute consists, and also on the original work of Littleton.

(*k*) It is usually cited either by the name of Co. Litt. or as 1 Inst.

(*l*) These are cited as 2, 3 or 4 Inst. without any author's name; an honorary distinction which, as we before observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

["the people have approved without writing ought also to "bind every body. For where is the difference, whether "the people declare their assent to a law by suffrage, or "by a uniform course of acting accordingly?" (*m*).

With us, indeed, it would seem that the statute law and a very considerable portion of the common law both flowed originally from the same fountain,—a great part of the common law being referrible to some positive enactment of the supreme legislature, which has been lost and forgotten as such (*n*), and is now preserved as general custom only, that is, as unwritten common law.]

II. The second branch of the unwritten law of England consists of *particular* or special customs affecting only the inhabitants of particular districts (*o*): and one of this kind it is usual to designate by the word *custom* taken *per se;* which sufficiently distinguishes it from the general customs of which we have already spoken.

These particular customs, or some of them, are probably the remains of a multitude of local customs, prevailing, some in one part and some in another, over the whole of England, while it was broken into distinct dominions; and out of which, after it became a single kingdom, one common law was collected and made applicable to the realm at large; each district sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of law. But, for reasons now long forgotten, particular counties, cities, towns, manors, and lordships were indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large, which privilege was confirmed to them in many instances by acts of parliament (*p*).

(*m*) Ff. 1, 3, 32.

(*n*) See per Wilmot, C. J., Collins *v.* Blantern, 2 Wils. 351; Hale's Hist. C. L. c. 4.

(*o*) Co. Litt. 110 b; vide sup. p. 52.

(*p*) See Mag. Cart. 25 Edw. 1; 1 Edw. 3, st. 2, c. 9; 14 Edw. 3, st. 1, c. 1; 2 Hen. 4, c. 1.

[Such is the custom of *gavelkind* obtaining in Kent, and some other parts of the kingdom, which ordains, among other things, that not the eldest son only of the father succeeds to his inheritance, but all the sons alike (*q*): and that, though the ancestor be attainted, yet the heir shall succeed to his estates, without any escheat to the lord (*r*). Such is the custom that prevails in some antient boroughs, and therefore called *borough-English*, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom which is found in certain boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, by the general law, she shall be endowed of one third part only. Such also are the special and particular customs of each manor, of which every one hears more or less, and which bind all the copyhold and customary tenants that hold of the said manor. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special usage; though indeed in numerous cases the customs have been also confirmed by act of parliament (*s*),] and in still more numerous cases these special customs have been preserved in the act. But the modern tendency of legislation is to abolish them; *e. g.*, all the special customs of the City of London, and of the City of York, relating to the distribution of the estates of intestates, have been recently abolished (*t*).

To this head has also sometimes, and in fact usually, been referred that branch of the law which comprises the rules relative to bills of exchange, partnerships, and other

(*q*) Co. Litt. 140 a.

(*r*) The doctrine of escheat on a conviction for felony is, however, now abolished altogether. (See 33 & 34 Vict. c. 23, s. 1.)

(*s*) See the City of London's case, 8 Rep. 126; The King *v.* Bagshaw, Cro. Car. 347; see also Pulling on the Laws and Customs of London, p. 2.

(*t*) 19 & 20 Vict. c. 94.

mercantile matters, and which body of rules is generally denominated the *custom of merchants* (*u*), or the law merchant. As its character, however, is not local, nor its obligation confined to any particular district, it cannot with propriety be considered as a special custom in the technical sense to which we now refer (*x*). It is, in truth, a part of the general law of England (*y*): and it is distinguished by a separate name, because it applies to the particular subjects in question principles more or less different from those which the common law ordinarily recognizes in other matters; and also because these principles were engrafted into our municipal system by gradual adoption from the *lex mercatoria*, or general body of European usages in matters relating to commerce (*z*).

For the same reason the *usages of particular trades*, when not restrained to some limit in point of place, as opposed to the realm at large, must be excluded from the technical idea of a custom. If there be any such usage of immemorial observance, and authenticated by judicial decision, it will form, according to our definitions, part of the general law of England; if there be any sanctioned by act of parliament, it will constitute part of the statute law; but for the rest, the want of any peculiar locality determines them to be no customs, and they are consequently no rules of law at all. Yet as matters of *fact* they often fall under the notice of our courts of justice, and are very necessary to be considered; for as the prevalence of any certain course of dealing among men leads to the presumption that in particular instances they intend to conform to it, the existence of such usages as these may often bear materially and even conclusively upon the question,

(*u*) 1 Bl. Com. 75.

(*x*) Co. Litt. 115 b.

(*y*) Per Holt, C. J., Hussey *v.* Jacob, Ld. Raym. 88; per Forster, J., Edie *v.* East India Company, 2 Burr. 1226; 1 Bl. Rep. 299, S. C.; 2 Inst. 58; Stone *v.* Rawlinson, Willes, 561. See also Benson *v.* Chapman, 8 C. B. (N. S.) 967, *in notis*.

(*z*) The *lex mercatoria*, or *law merchant*, is mentioned in some of our earlier statutes. (See 27 Edw. 3, st. 2, cc. 8, 19, 20.)

whether an implied contract to a given effect was entered into between certain parties; and also upon the question in what sense their express contract in certain cases was designed to be understood (*a*).

The rules relating to particular or special customs regard either the proof of their existence, or their allowance as good and legal, when proved. And first we will consider the rules of *proof*.

As to the modes of descent in gavelkind, and borough-English, the law takes notice of them; and there is no occasion therefore to prove that such customs actually exist, but only that the lands in question are subject thereto (*b*). But with respect to most special customs, not only must their existence be shown, but also that the thing in dispute is within the custom alleged. [The trial in both cases—both to show the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to show "that the lands in question are within that manor,"—is by a jury of twelve men, and not by the judges; unless the same custom has been before tried, determined, and recorded in the same court (*c*).

The customs of London differ from all others in point of trial; for if the existence of the custom be brought in question, it shall not be tried by a jury, but by a certifi-

(*a*) The law on this subject has been recently much discussed in relation to the *rules of the Stock Exchange*, and the extent to which they are grafted on the contracts there made. See Cropper *v.* Cook, Law Rep., 3 C. P. 194; Grissell *v.* Bristowe, ib. 4 C. P. 36; Mollett *v.* Robinson, ib. 5 C. P. 646; Allen *v.* Graves, ib. 5 Q. B. 478; Bowring *v.* Shepherd, ib. 6 Q. B. 309; Maxted *v.* Paine, ib. 6 Exch. 132; Duncan *v.* Hill, ib. 255; Hodgkinson *v.* Kelly, ib. 6 Eq. Ca. 496; Rennie *v.* Morris, ib. 13 Eq. Ca. 203; Pearson *v.* Scott, ib. 9 Ch. D. 198; Coles *v.* Bristowe, ib. 4 Ch. App. 3; Hawkins *v.* Maltby, ib. 200; Cruse *v.* Paine, ib. 441; Merry *v.* Nichols, ib. 7 Ch. App. 733; Lacy *v.* Hill, ib. 8 Ch. App. 921; Tomkins *v.* Lyon, ib. 3 App. Ca. 213.

(*b*) Co. Litt. 175; Year Book, 36 Hen. 6, 20, 21; see Consuet. Kantiæ (17 Edw. 2, st. 1, c. 16); 4 & 5 Vict. c. 35, s. 80.

(*c*) Dr. & St. 1, 10.

[cate from the lord mayor and aldermen by the mouth of their recorder (*d*); unless indeed it be such a custom as the corporation is itself interested in—as a right of taking toll—for then the law permits them not to certify on their own behalf (*e*).

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for if it is not a good custom it ought to be no longer used; "*Malus usus abolendus est*" is an established maxim of the law (*f*).]

As to the legality of a custom, the following rules are established: 1. It must have been *used so long, that the memory of man runneth not to the contrary.* Upon this subject, however, it is material to recollect what has been before laid down, that the time of memory as regards the validity of a custom, or (as it is sometimes expressed) the time of *legal* memory, has received a peculiar technical limitation, and refers to so remote a date as the commencement of the reign of King Richard the first (*g*). So that if an usage can be shown to have first commenced at any time since that era, it is void as a custom; though in the absence of such proof its observance for a long time, and as far back as the evidence reaches, will amount to presumptive proof of its having prevailed during the whole period of legal memory (*h*). It is important also to bear in mind that this principle, by which a custom is required to be immemorial, is materially qualified in many cases by a modern statute, 2 & 3 Will. IV. c. 71; which, as to customary and prescriptive claims of rights to be exercised over the land of other persons, (such as the rights of common, or way, or the like,) provides that they shall be considered as sufficiently established by an un-

(*d*) See Appleton *v.* Sloughton, Cro. Car. 516; Plummer *v.* Bentham, 1 Burr. 248; Blacquiere *v.* Hawkins, Dougl. 378; Westoby *v.* Day, 2 Ell. & Bl. 605; per Pollock, C. B., in Cox *v.* Mayor of London, 1 Hurls. & Colt. p. 356.

(*e*) Day *v.* Savadge, Hob. 85.

(*f*) Litt. § 212; 4 Inst. 274.

(*g*) Co. Litt. 115 a; et vide sup. p. 50.

(*h*) Rex *v.* Joliffe, 2 Barn. & Cres. 54.

interrupted enjoyment as of right, in some cases for thirty, in others for twenty years; and shall not be defeated (where such enjoyment can be proved) by showing that they commenced within the time of legal memory (*i*).

2. A custom must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for a temporary interruption of the *possession* only will not destroy the custom (*k*). As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued, even for a day, the custom is quite at an end.

3. A custom must have been *peaceable*, and acquiesced in; not subject to contention and dispute (*l*). For customs seem to derive their authority from their allowance at some remote period, by common consent: and where the practice or usage has been immemorially disputed, the evidence of this consent is wanting (*m*).

4. [A custom must be *reasonable* (*n*); or rather, taken negatively, it must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law (*o*). Upon which account a custom may be good, though the particular

(*i*) As to *prescription*, vide post, bk. II. pt. I. c. XXIII.

(*k*) Co. Litt. 114.

(*l*) Ibid.

(*m*) Vide sup. p. 60.

(*n*) See Year Book, 8 Edw. 4, 19; Litt. s. 212; Wilkes *v.* Broadbent, 1 Wils. 63; Bell *v.* Wardell, Willes, 202; Marquis of Salisbury, *v.* Gladstone, 9 H. of Lords' Cas. 692; Cox *v.* Mayor of London, 1 Hurls. & Colt. 338; Bryant *v.* Foot, Law Rep., 3 Q. B. 497; Lawrence *v.* Hitch, ib. 521; Mills *v.* Colchester, ib. 2 C. P. 476; Bradburn *v.* Foley, ib. 3 C. P. D. 129; Sowerby *v.* Coleman, ib. 2 Exch. 96; Hall *v.* Nottingham, ib. 1 Exch. D. 1.

(*o*) Co. Litt. 62.

[reason of it cannot be assigned; for it sufficeth if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his, and then the tenants will lose all their profits (*p*).

5. A custom ought to be *certain* (*q*). A custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good (*r*). A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est quod certum reddi potest.*

6. A custom, though established by consent, must be (when established) *compulsory;* and not left to the option of every man, whether he may use it or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Customs must be also *consistent* with each other; one custom cannot be set up in opposition to another (*s*). For

(*p*) Co. Coph. § 33.

(*q*) 1 Roll. Abr. 565; Selby *v.* Robinson, 2 T. R. 758; Steel *v.* Houghton, 1 Hen. Bl. 51.

(*r*) Roll. Abr. ubi sup.

(*s*) See Aldred's case, 9 Rep. 58 b; Kenchin *v.* Knight, 1 Wils. 253; 1 Bl. Rep. 49, S. C.; Parkin *v.* Radcliffe, 1 Bos. & Pull. 282.

[if both are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs is absurd.] Therefore if a man should allege that as a fisherman he is entitled, by the custom of a certain place, to dry his nets upon another's land,—which in favour of fishing and navigation is a reasonable usage,—the latter could not allege in opposition to this a right by custom to remove the nets when so placed; for these two contradictory customs cannot both be good, nor both stand together (*t*). But one custom may be subordinate to, and therefore controlled by, another custom (*u*); and in this case, both customs may well stand together.

8. [It is also a rule that a custom in derogation of the general law, must be construed strictly (*v*). Thus, by the custom of gavelkind, an infant of fifteen years may by one species of conveyance, (called a deed of feoffment,) convey away his lands in fee simple, that is, for ever. But this custom does not empower him to use any other conveyance, for the custom must be strictly pursued.] Yet if there be a custom in a manor that a man may convey his copyhold in fee simple, this will also enable him to convey for life, or any other estate; for the less is implied in the greater; and though customs must be strictly, yet they need not in every case be literally, construed (*x*).

9. Lastly, it is to be understood that no custom can prevail against an express act of parliament (*y*). Therefore an alleged custom that every pound of butter sold in a certain market must weigh eighteen ounces, was held to be void, on the ground that there was an act which

(*t*) 1 Roll. Abr. 560; Hickman *v.* Thorne, 2 Mod. 104.

(*u*) Bateson *v.* Green, 5 T. R. 411; and see Brown's Scriven on Copyholds, 6th ed., p. 265.

(*v*) Arthur *v.* Bokenham, 11 Mod. 161; Denn *v.* Spray, 1 T. R. 466.

(*x*) Co. Cop. § 33. This limitation of the rule is noticed in Coleridge's Blackstone, vol. i. p. 79; and see Denn *v.* Spray, 1 T. R. 466.

(*y*) Co. Litt. 113 a.

directed that throughout the kingdom there should be sixteen ounces to the pound (*z*). And thus much for the second part of the *leges non scriptæ*, or those particular or special customs which affect particular districts only.

Let us next proceed to the *leges scriptæ*, the written laws of the kingdom (*a*); which are statutes, acts, or edicts, made by the sovereign, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled (*b*). The oldest of these now extant and printed in our statute books, is the famous *Magna Charta* of king John, as confirmed in parliament (*c*).

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliament. At present we will only take notice of the different kinds of statutes; and of the rules of law with regard to their effect and construction (*d*).

(*z*) See Noble *v.* Durell, 3 T. R. 271.

(*a*) Vide sup. p. 45.

(*b*) The Prince's case, 8 Rep. 20.

(*c*) 25 Edw. 1. The statutes from Magna Charta down to the end of Edw. 2—including also some which (because it is doubtful whether to assign them to the reign of Hen. 3, of Edw. 1, or of Edw. 2) are termed *incerti temporis*,—compose what have been called the *Vetera Statuta;* those from the beginning of the reign of Edw. 3 being contradistinguished by the appellation of the *Nova Statuta*. (Dwarris on Statutes, 626.) It may be observed, that by 19 & 20 Vict. c. 64; 24 & 25 Vict. c. 101; 26 & 27 Vict. c. 125; 30 & 31 Vict. c. 59; 33 & 34 Vict. c. 69; 34 & 35 Vict. c. 116; 35 & 36 Vict. c. 63, c. 97, c. 98; 36 & 37 Vict. c. 91; 37 & 38 Vict. cc. 35, 96; 38 & 39 Vict. c. 66; 39 & 40 Vict. c. 20; 41 & 42 Vict. c. 79; 42 & 43 Vict. c. 59; and 44 & 45 Vict. c. 59, a variety of Acts not in use or in force, or now unnecessary,—are expressly repealed.

(*d*) The method of citing acts of parliament is various. Many of the antient ones are called after the name of the place where the parliament was held that made them;—as the statutes of Merton and Marlborough, of Westminster, Gloucester and Winchester. Others are named after their subject;—as the statutes of Wales and Ireland, the *articuli cleri* and the *prærogativa regis*. Some are distinguished by their initial words, as the statute of *Quia emptores*, and that of *Circumspectè agatis*. But the most usual method has been to name the

First, as to their several kinds. Statutes are either *public* or *private* (*e*). Thus—to show the distinction—the statute 13 Eliz. c. 10, which prohibits the master and fellows of any college, the dean and chapter of a cathedral, or any other person having a spiritual living, from making leases for longer terms than twenty-one years, or three lives, is a public Act (*f*); it being a rule prescribed to spiritual persons in general: but an Act to enable the Bishop of Chester to make a lease to A. B. for sixty years (which is, in general, beyond a bishop's power), concerns only the parties and the bishop's successors, and is therefore a private Act. Again, of private Acts, some are *local*, as affecting particular places only, others *personal*, as confined to particular persons (*g*). Of the first kind, an inclosure Act is an example; of the second, an Act for a change of name (*h*). With respect to the distinction

year of the reigning sovereign and the chapter or particular Act, according to its numeral order;—as, 9 Geo. 2, c. 4. For all the Acts of one session of parliament taken together make properly but one statute; and, therefore, when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the Bill of Rights is cited as 1 W. & M. st. 2, c. 2. It has, of late, been a common plan to insert in an Act a name referring to its subject-matter and date by which it shall be legal to cite it without further particularity, *e. g.*, "The Public Health Act, 1875." It may be worth remarking here that it has been held that the *title* is no part of an Act. (See Att.-Gen. *v.* Weymouth, Amb. 22; Jeffries *v.* Alexander, 8 H. of L. Cas. 603, n.) As to the *marginal notes* appended to each section, see Claydon *v.* Green, Law Rep., 3 C. P. 511; Venour *v.* Sellon, ib. 2 Ch. D. 525. As to the *preamble*, see Rex *v.* Pierce, 3 M. & S. 62; Salkeld *v.* Johnson, 1 Hare, 196. As to the *subheadings* of particular sections, see Hammersmith Rail. Co. *v.* Brand, Law Rep., 4 H. of L. Cas. 171.

(*e*) As to the law of public and private Acts see Lord Cromwell's case, 4 Rep. 13 a; Holland's case, ib. 76 a; Kirk *v.* Nowill, 1 T. R. 125; Samuel *v.* Evans, 2 T. R. 569. Thus, too, the Roman lawyers distinguish between the *senatûs consulta*, which regarded the whole community, and the *senatûs decreta*, which operated only upon particular persons and private concerns (Gravin. Orig. 1, § 24).

(*f*) Holland's case, 4 Rep. 76 a.

(*g*) In our printed statute book some Acts are described as being "public Acts of a local character." Some *private* Acts are not printed at all. (See 5 & 6 Vict. c. 97, s. 5; Barnett *v.* Cox, 9 Q. B. 617.)

(*h*) We find also in our books

between public and private statutes, it is to be observed that the courts are bound to take notice judicially of the former, but not of the latter; but by 13 & 14 Vict. c. 21, every statute made after the year 1850 is to be taken to be a public one, and judicially noticed as such, unless the contrary be therein expressly declared (*i*).

Statutes also are sometimes described as *declaratory*, or *penal*, or *remedial*, according to the different nature of their object or provisions. Declaratory statutes are where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus, the statute of treasons, 25 Edw. III. st. 5, c. 2, did not make any new species of treasons; but only, for the benefit of the subject, declared and enumerated those several kinds of offence, which before were treason at the common law. Penal acts are those which impose penalties or punishments for an offence committed, as in the case of the statutes relative to game. Remedial acts are such as supply some defect in the existing law, and redress some abuse or inconvenience with which it is found to be attended, without introducing any provision of a penal character;—as in the case of the statute 3 & 4 Will. IV. c. 105, which introduced various improvements in the law relating to dower. But it is not every statute that falls within one or other of these divisions; for some combine more than one of these objects, and others have objects of a different description. There is also a distinction of acts of parliament, as being either *enlarging*, or *restraining*, *enabling*, or *disabling* acts. Thus the 32 Hen. VIII. c. 28, which gave bishops and other

some Acts termed *general* and others *particular*; as to which it may be observed, that one of the latter class is not repealed by a general statute later in date, unless by express reference or by necessary construction. (Thorpe *v.* Adams, Law Rep., 6 C. P. 125.)

(*i*) Known as "Lord Brougham's Act;" see Chorlton *v.* Lings, Law Rep., 4 C. P. 374.

sole ecclesiastical corporations (except parsons and vicars) a more ample power of making leases than they possessed before, is called an enabling statute: the 13 Eliz. c. 10, above noticed, which afterwards imposed certain limitations as to the making of leases by ecclesiastical persons, is described as a restraining or disabling statute (*k*).

Secondly, as to their interpretation. In interpreting statutes,—as well as in declaring the rule of the common law (*l*),—the courts are governed by former adjudications (*m*); or, in the absence of these, by analogy and general reasoning (*n*). But many specific rules are also laid down for their guidance; and principally these which follow.

1. A statute begins to operate from the time when it receives the royal assent, unless some other time be fixed by the act itself for the purpose (*o*). The rule on this subject was formerly different; for at common law every act of parliament, which had no provision to the contrary, was considered, as soon as it passed, (that is, received the royal assent,) as having been in force retrospectively from the first day of the session of parliament in which it passed, though in fact it might not have received the royal assent, or even been introduced into parliament, until long after that day. Thus where a statute provided that every deed of annuity granted *after the passing of the act* should be inrolled within twenty days after execution, and the act received the royal assent in May, 1777, but the session had commenced in October, 1776, an annuity deed, exe-

(*k*) Co. Litt. 44 b; 1 Bl. Com. 87.

(*l*) Vide sup. p. 53.

(*m*) By Lord Kenyon, Lacon *v.* Hooper, 6 T. R. 224; and see Rex *v.* Leek Wootton, 16 East, 122.

(*n*) Hob. 346.

(*o*) 33 Geo. 3, c. 13; Nares *v.* Rowles, 14 East, 510. But, by 48 Geo. 3, c. 106, where an Act expires before a bill for continuing it, introduced in the same session, receives the royal assent, the latter Act takes effect (unless otherwise provided, and except as to penalties,) from the expiration of the former. Of late years it has been usual to pass an Act in each session, continuing for a fixed period certain Acts then about to expire. 41 & 42 Vict. c. 70 (1878) is an example of such a statute.

cuted in January, 1777, nearly four months before the royal assent was given, but after the commencement of the session, was adjudged to be void for non-compliance with the provision (*p*). This strange principle, however, though rigidly observed for centuries, no longer prevails; it being expressly provided by 33 Geo. III. c. 13, that where no other direction is given, every act shall be considered as commencing from the date indorsed upon it as the date of its receiving the royal assent—a manifest improvement, it must be owned, on the former law; though it has been doubted (and with reason) whether even the new rule is placed upon the right basis, and whether some fixed and reasonable period ought not always to be interposed between the passing of an act and the time of its coming into operation, so as to give the subjects of the realm an opportunity of becoming acquainted with its provisions (*q*). The rule, it will be observed, is laid down with an exception of the case where the period of commencement is otherwise fixed by the statute itself; for by force of an express provision, or even by necessary construction from the nature of the enactment, the operation of a statute may be either postponed on the one hand, or have a retrospective relation on the other, so as to affect rights which had vested before it received the royal assent, or transactions which had before then taken place (*r*).

2. Statutes are to be construed not according to their mere letter, but the intent and object with which they were made (*s*). It occasionally happens therefore that the judges who expound them are obliged, in favour of the intention, to depart in some measure from the words. And this may be either by holding that a case within the words,

(*p*) Latless *v.* Holmes, 4 T. R. 660.

(*q*) See Kent's Comm. Lect. 20; Dwarris on Stats. 683.

(*r*) Upon the subject of construing a statute retrospectively, see Burn *v.* Carvalho, 1 Ad. & El. 338; Hitchcock *v.* Way, 6 Ad. & El. 943; Moon *v.* Durden, 2 Exch. 22; Wright *v.* Hale, 6 H. & N. 229.

(*s*) Bac. Ab. Statute (1), 5; Stradling *v.* Morgan, Plow. 205; Rex *v.* Everdon, 9 East, 101.

is not within the meaning; or that a case not within the words, is within the meaning. Thus where a statute provides that all who shall commit a certain act shall be deemed felons, yet a madman who does the act shall not be deemed a felon; for that would be contrary to the presumable intention (*t*). And so, on the other hand, where an act of parliament gave the owners of inheritances a remedy by action against such tenants holding for life or *years* as should commit waste (i. e. spoil and destruction); the action was held maintainable against a tenant holding only for one year or less, for so the law-makers presumably designed (*u*). In all instances where the strict letter of the law is thus corrected by reference to its intention, the construction is said to be by *equity* (*x*), a phrase not peculiar to the law of England, but used by foreign jurists in the same sense (*y*). Thus, in the first example, the case would be said to be out of the equity of the act; in the second to be within its equity (*z*). It is to be observed, however, that this principle of equitable construction is not to be carried beyond certain bounds, and a judge is not at liberty, in favour of a supposed intention, to disregard the express letter of the statute, where, for anything that appears, the wording may correspond with the actual design of the legislature—the maxim in cases of this description being that *a verbis legis non recedendum est* (*a*). It is also important to remark, that the rule in question has been applied more freely to the antient statutes than it has been to those of more modern date, which are interpreted somewhat more strictly, and with closer adherence to the letter (*b*). For the style of framing acts of parliament

(*t*) Eyston *v.* Studd, Plow. 465.

(*u*) Ibid. 467.

(*x*) Ibid.; Co. Litt. 24 b. The term is of very early occurrence in our law (see Bract. lib. 1, c. 4, p. 3 a; lib. 2, c. 7, p. 23 b.)

(*y*) Grotius de Æquitate, s. 3; Puffendorf, Elem. Jur. Un. lib. 1, ss. 22, 23.

(*z*) 3 Bl. Com. 431. The latter expression is of more familiar occurrence, however, than the former.

(*a*) Edrich's case, 5 Rep. 118 b; and see Jones *v.* Smart, 1 T. R. 52; and R. *v.* Inhabitants of Great Bentley, 10 Barn. & Cress. 520.

(*b*) Per Coleridge, J., Rex *v.* Gardner, 6 Ad. & El. 118; and see

has itself undergone a material change—those of a more antient era being comparatively short and general in their character, while the later acts are expanded into minute detail, and intended to reach every specific case; and therefore, in adopting a construction not in strict conformity with the language of the legislature, there is now more danger, than there once was, of going beyond, or falling short of, its real intention.

3. Another maxim (and one that may often serve for our guidance in the application of the last), is, that in the interpretation of statutes in general, the following points are to be considered,—the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief (*c*). And here an example may be found in the restraining statute of 13 Eliz. c. 10, to which we have already adverted (*d*). By the common law the master and fellows of a college, and other such corporations, might let as long leases as they thought proper; the mischief was that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases made by them for longer terms than three lives, or twenty-one years. Now in the construction of this statute it was held, that leases, though for a longer term, made by the master and fellows of a college or a dean and chapter, are not void during the time of the master or the dean; for the act was made for the benefit and protection of the successor (*e*), and the mischief is therefore sufficiently sup-

Brandling *v.* Barrington, 6 Barn. & Cress. 475; Rex *v.* Inhabitants of Barham, 8 Barn. & Cress. 104; Notley *v.* Buck, ib. 164; Adam *v.* Inhabitants of Bristol, 2 Ad. & El. 395, 399.

(*c*) Heydon's case, 3 Rep. 7; 1 Bl. Com. 87; 2 Inst. 110.

(*d*) Vide sup. p. 71.

(*e*) Co. Litt. 45, n. (4), by Harg.; Bac. Ab. Leases (H.); Magdalen College case, 11 Rep. 73 a. And see Magdalen Hospital (Governors) *v.* Knotts, 5 Ch. Div. 175: on appeal, 8 Ch. Div. 709, and 4 App. Ca. 324.

pressed by vacating them after the determination of the interest of the grantors; but the leases, during the continuance of the grantors, not being within the mischief, are not within the remedy (*f*).

4. It is also an established rule, that remedial statutes are to be more liberally, and penal more strictly, construed (*g*). The statute of Elizabeth just mentioned may again serve as an example; for, soon after it was made, the master and fellows of Magdalen College granted certain premises to the queen, her heirs, and successors, on condition that she should convey the same to a certain person named: and it was contended that this conveyance was not restrained by the act; for that by the general rule of law the sovereign is not bound by a statute unless specially mentioned; which the court admitted to be in many cases true. But as this was a remedial act, and made to suppress wrong, it was adjudged that it should bind the queen (*h*). As to the stricter manner in which a penal act must be interpreted, we may resort to an illustration of Lord Bacon's, that if for a certain offence it be enacted that a man shall lose his right hand, and some offender hath had his right hand before cut off in the wars; he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law shall be extended (*i*). This distinction applies, it will be observed, not only to remedial and penal statutes properly so called, but also to those of a mixed kind, which contain both remedial and penal provisions; the former of which will be construed with more indulgence than the latter (*k*).

5. In the construction of a statute all other such statutes ought to be taken into consideration as have been made

(*f*) 1 Bl. Com. 87.
(*g*) Ibid. 88.
(*h*) Magdalen College case, 11 Rep. 72.
(*i*) Bac. Maxims, 12.
(*k*) See Platt *v.* Sheriffs of London, Plowd. 36; Bones *v.* Booth, W. B. 1236.

in pari materiâ (*l*). Thus by the 7 Geo. II. c. 15, it was enacted, that ship-owners, carrying goods, were not to be responsible for losses to such goods, incurred (without their privity) by the misconduct of the master and mariners, to any greater extent than the value of the ship, *with all her appurtenances*, and the freight. By 26 Geo. III. c. 86, they were exempted from liability for loss incurred by robbery of any persons whatsoever, further than the value of the ship, *with all her appurtenances*, and the freight. By 53 Geo. III. c. 159, s. 1, they were not to be answerable for losses arising from any act done without their fault or privity, beyond the value *of the ship* and freight. Upon the last act a question arose, whether the owner of a vessel was answerable for the value of certain fishing stores belonging to the ship, and lost by an accidental collision at sea; and the court held him answerable; and remarked, that in subsequent sections of the same act, and also in the two preceding statutes, which were *in pari materiâ*, the words used were ship *and all her appurtenances;* so that the section in question was to be understood as if the words *with all her appurtenances* were used therein, supposing that those words would make any difference in the sense (*m*). This rule, it will be observed, applies whether the prior acts are referred to in the statute on which the question arises, or not. They are considered, indeed, as all forming one continued enactment (*n*).

6. A statute which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior (*o*). And therefore, inasmuch as the statute of 13 Eliz. c. 10, before referred to, applied its prohibition to "masters and fellows of colleges, deans and

(*l*) Bac. Abr. Statute (I), 2, 3; Jones *v.* Smart, 1 T. R. 53; King, qui tam *v.* Smith, 4 T. R. 419; Duck *v.* Addington, 4 T. R. 447; Gale *v.* Laurie, 5 Barn. & Cress. 156.

(*m*) Gale *v.* Laurie, 5 Barn. & Cress. 156.

(*n*) Earl of Aylesbury *v.* Pattison, 1 Doug. 30.

(*o*) 1 Bla. Com. 88.

chapters of cathedrals, masters of hospitals, parsons and vicars, or any other having any spiritual or ecclesiastical living," a *bishop* was held not to be included within its provisions; for, though he has a spiritual living, he is of higher dignity than any of the persons enumerated (*p*).

7. Where the provision of a statute is general, every thing which is necessary to make such provision effectual is supplied by the common law (*q*). And therefore, when anything is commanded or prohibited, though only in general terms, by an act of parliament, and no remedy is expressly given in the event of its provision being violated, yet is the party, who sustains an injury by such violation, entitled to bring an action for his private relief; and if the matter be of public concern, the offender shall besides be considered as guilty of a misdemeanor, and liable to indictment accordingly (*r*). The law in this case will be the same, even though the statute, after the prohibition, proceeds by a separate clause to annex a particular pecuniary penalty to the offence if committed; for that will not take away the other remedies (*s*); but where a statute merely inflicts a pecuniary penalty for an act not previously unlawful, and contains no direct prohibitory clause, no indictment can in this case be sustained;—the only remedy is to proceed for the penalty (*t*).

8. A subsequent statute may repeal a prior one, not only by express provision to that effect, but by necessary implication; and every statute is a repeal by implication

(*p*) Archbishop of Canterbury's case, 2 Rep. 46 b; 2 Hawk. c. 27, s. 124.

(*q*) Bac. Abr. Statute (B).

(*r*) 2 Inst. 131, 163. See the case of the Marshalsea, 10 Rep. 75 b; 2 Hale, P. C. 171; Rex *v.* Harris, 4 T. R. 205; Rex *v.* Leginham, 1 Mod. 71; Carden *v.* General Cemetery Company, 5 Bing. N. C. 253; R. *v.* Badger, 12 L. J., Q.B., N. S. 227.

(*s*) Per Ashurst, J., Rex *v.* Harris, 4 T. R. 205; Beckford *v.* Hood, 7 T. R. 620; Rex *v.* Wright, 1 Burr. 543; and see especially Cooper *v.* Whittingham, 15 Ch. D. 501; Tottenham Local Board *v.* Rowell, 15 Ch. D. 378; and consider Powell *v.* Fall, 5 Q. B. D. 597.

(*t*) See Rex *v.* Buck, 2 Str. 679; Rex *v.* Wright, ubi sup.; Rex *v.* Robinson, 2 Burr. 805.

of a preceding statute, so far as it is contrary thereto, for *leges posteriores priores abrogant* (*u*); consonant to which it was laid down by a law of the Twelve Tables at Rome, that *quod populus postremum jussit, id jus ratum esto.* But this is to be understood only when the matter of the later statute is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror shall have an estate of twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: —here the latter statute virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end (*x*). But if the enactments are such that they may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. As if by a former law an offence be indictable at the quarter sessions, and a later law makes the same offence indictable at the assizes;—here the jurisdiction of the sessions is not taken away, but both have concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere* (*y*).

9. It was formerly the rule, that if a statute, repealing another, was itself repealed afterwards, the first statute was revived, without any formal words for that purpose (*z*). Thus when the statute of 5 & 6 Edw. VI. c. 12, providing that the matrimony of priests should be deemed true and lawful matrimony to all purposes, was repealed by a statute 1 Mary, st. 2, c. 2, and this latter statute was

(*u*) Bac. Abr. Statute (D). See Paget *v.* Foley, 2 Bing. N. C. 679; Daw *v.* The Metropolitan Board of Works, 12 C. B., N. S. 161; Garnett *v.* Bradley, Law Rep., 3 App. Ca. 944.

(*x*) Jenk. Cent. 2, 73.

(*y*) Dr. Foster's case, 11 Rep. 63. See The Conservators of the Thames *v.* Ball, Law Rep., 1 C. P. 415.

(*z*) See The Bishop's case, 12 Rep. 7; 4 Inst. 325; Tattle *v.* Grimwood, 3 Bing. 493; Doe *v.* Gully, 9 Barn. & Cress. 344; Phillips *v.* Hopwood, 10 Barn. & Cress. 39.

afterwards repealed by the act of 1 Jac. 1, c. 25; it was held that there needed not any express words of revival in King James's statute (though such words are in fact contained), but that the act of Edward the sixth was impliedly and virtually revived (*a*). But the rule is now different, it being enacted by 13 & 14 Vict. c. 21, ss. 5, 6, that where any act repealing in whole or in part any former statute is itself repealed, such last repeal shall not revive the act or provisions before repealed, unless words be added for that purpose; and that where any act shall be made repealing in whole or in part any former act, and substituting provisions instead of those repealed, such repealed provisions shall remain in force till those substituted shall come into operation by force of the last made statute.

10. [Acts of parliament derogatory from the power of subsequent parliaments bind not. Accordingly the statute 11 Hen. VII. c. 1, which directed that no person for assisting a king *de facto* should be attainted of treason by act of parliament or otherwise, was held to be good only as to common prosecutions for high treason, but not to restrain or clog any parliamentary attainder (*b*). And this because the legislature being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. "When you repeal the law "itself," says he, "you at the same time repeal the pro-"hibitory clause, which guards against such repeal"[c]

(*a*) The Bishop's case, 12 Rep. 7. 4 Inst. 43.

(*c*) "*Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat.*"—Ep. ad Att. iii. 23.

These are the several grounds of the law of England in its proper and original extent. There is a species, however, of unwritten law to which no reference has yet been made, but which has long formed part of the general system, and (though here noticed in the last place) constitutes one of its principal divisions. This is *equity*; which is so termed by way of distinction from the original and proper law of England, or (as it is usually called in this case) the *common law*. For that phrase (we are to observe) is used in two senses—either to express the institutions which are not founded on any known statute, but on custom only (*d*),—or those which are distinct from equity. Indeed the term serves in both cases to indicate that which is more antient, as opposed to that which is less so; the statute law being of modern creation when compared with that which is of immemorial antiquity; and equity being of considerably later birth than some of the earlier parts of the statute law. The origin of equity may be stated as follows. The antient structure of our national jurisprudence (whatever might be its merit in other particulars) was singularly defective in compass and enlargement of view. It took no account of several subjects for which it is the duty of a civilized judicature to provide; and to others, it applied maxims too strict and unbending to satisfy the notions of justice in an advanced state of society. Its judicial remedies were also in some cases of a cumbrous and inconvenient character. For these evils the progressive introduction of new remedial laws, by act of the legislature, would seem to have been the natural remedy. But the course of things was different. Owing perhaps to some peculiar averseness in the early genius of the country from change in its legal institutions, the law administered between subject and subject, in the antient courts of the realm, was allowed to remain for a long period of our history with very little alteration of a funda-

(*d*) Vide sup. p. 44 et seq.

mental kind. But new courts were on the other hand gradually established with a collateral, and, in some sense, an usurped jurisdiction, in which cognizance was taken of those subjects which the proper law of England had overlooked or insufficiently regulated; relief was given from the consequences of some of its harsher doctrines; and the defects of its judicial methods were in certain cases supplied. These courts having been at the outset chiefly resorted to for one of the particular purposes above enumerated, viz., the mitigation of the severity of the common law as applied to particular cases, the whole system of rules and principles there administered obtained,—without much propriety, but in reference to the liberal principle of interpretation applied by jurists to the interpretation of positive laws (*e*),—the appellation of *equity*,—and soon began to hold that divided empire with the more antient, or common law, which it afterwards maintained. Thus it happened that in the chief of these tribunals—viz., the High Court of Chancery—a very large proportion of the whole forensic business of the country, (that is, in matters of property, for beyond this it never assumed jurisdiction,) came to be administered; and the extensive subjects, in particular, of *trusts* and *partnerships*, fell almost exclusively under its management. It was also the proper and regular tribunal to which recourse was had, when the object was either to compel a man to perform a contract into which he had entered, or to cause him to abstain from the commission of an injury,—the common law courts interfering in general only so far as to award *damages* where the breach of contract or wrong had been already committed; though their jurisdiction in this respect was somewhat enlarged by the Common Law Procedure Act, 1854 (*f*). But by the operation of the Judicature Act, 1873, the two systems of law and equity are now administered in the

(*e*) Vide sup. p. 73; Mitford, Plead. in Chan. p. 3.

(*f*) 17 & 18 Vict. c. 125. See Benson *v.* Paull, 6 Ell. & Bl. 373; Norris *v.* Irish Land Company, 8 Ell. & Bl. 526.

appropriate divisions of a single tribunal, constituted out of the superior courts of justice existing at the date of that statute, and styled Her Majesty's Supreme Court of Judicature (*g*); and that Act contains a general provision that in all matters in which there is any conflict or variance between the rules of equity and the rules of common law, with reference to the same matter, the rules of equity shall prevail (*h*).

Vide post, bk. v. c. v.

(*h*) 36 & 37 Vict. c. 66, s. 25 (11).

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

By the common law, the municipal law of England does not extend to any place out of England, and therefore does not extend to Wales, Scotland, Ireland, Berwick-upon-Tweed, or any other part of the dominions of the Crown excepting England; nevertheless, by force of the statute law (*a*) the laws of England do now obtain, with more or less restrictions, in all of these places (*b*);—of each of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

[For many centuries after its invasion by the Romans, that part of Britain called Wales remained independent of England, and in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general (*c*); and in the time of the Saxons, the antient and Christian inhabitants of the island retired to its natural intrenchments, for protection against their pagan visitants. But when these invaders themselves were converted to Christianity, and settled into regular and potent governments, this retreat of the antient Britons grew every day narrower; they were over-run by little and little, gradually driven

(*a*) 1 Bl. Com. p. 93.

(*b*) It may be here remarked that such statutes as apply exclusively to Scotland, Ireland, or the Colonies, are not, as a general rule, noticed in this work, which professes only to treat of the laws of *England*.

(*c*) As to Wales, see Vaugh. 395—420; Rex *v.* Cowle, 2 Burr. 850; 2 Inst. 195; 4 Inst. 239; Buckley *v.* Thomas, Plowd 121, 123, 126, 129.

[from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward the first, who may justly be styled the conqueror of Wales, the line of their antient princes was abolished (*d*), and the king of England's eldest son was created their titular prince (*e*); the territory of Wales being then entirely re-annexed, by a kind of feodal resumption, to the dominion of the crown of England (*f*); or, as the statute of Wales expresses it, "*terra Walliæ cum incolis suis, prius regi jure feodali* "*subjecta* (of which homage was the sign), *jam in pro-* "*prietatis dominium totaliter et cum integritate conversa* "*est, et coronæ regni Angliæ tanquam pars corporis ejus-* "*dem annexa et unita*" (*g*). By this statute of Wales very material alterations were also made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings; but they still retained very much of their original polity, particularly their rule of inheritance, viz., that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was given by the statute 27 Hen. VIII. c. 26 (as confirmed and enlarged by the statute 34 & 35 Hen. VIII. c. 26); which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty, being insen-

See Turner's Hist. Eng. p. 3, c. ii.; Hume's Hist. Eng. c. xiii.

(*e*) Blackstone says he became "their titular prince as a matter of course;" but the expression is not accurate; as the title of Prince of Wales is always conferred on the heir apparent by special creation and investiture.

(*f*) Vaugh. 400; Rex *v.* Cowle, 2 Burr. 851.

(*g*) 12 Edw. 1.

[sibly put upon the same footing, and made fellow-citizens, with their conquerors.]

By these statutes of Hen. VIII. it was enacted, amongst other matters of less importance:—1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, shall be used in Wales. 5. That Wales shall be divided into twelve counties or shires, exclusive of the county of Monmouth, which is made one of the counties of England.

From the time of Hen. VIII., therefore, the civil condition of the principality has differed but slightly from that of the kingdom at large: and it may be remarked, that an Act of Parliament, where England only is mentioned, now includes Wales also (*h*). There were, however, two particulars of distinction sufficiently important to deserve notice--first, that Wales at one time possessed within itself superior courts called Courts of Great Session, independent of the process at Westminster Hall; and was not visited by the English judges of assize (*i*): secondly, that such of its counties and towns as were represented in parliament sent each one member only, the usual number in England being two. But, in 1831, by 11 Geo. IV. & 1 Will. IV. c. 70, the jurisdiction of the Courts of Great Session was abolished; and it was by the same statute enacted that assizes should be held in the principality for the trial of all matters criminal and civil, in like manner and form as had been usual for the counties in England. And by the Reform Act of the succeeding year (2 & 3 Will. IV. c. 45), a new arrangement was made as to the return of members

(*h*) See 20 Geo. 2, c. 42, s. 3. So also by 8 & 9 Vict. c. 11, the manner of assigning *sheriffs* of counties in Wales is regulated and assimilated to that in England.

(*i*) The proceedings in the Courts of Great Sessions were partly regulated by 13 Geo. 3, c. 51.

for Wales; by the effect of which three of its counties *respectively send two knights of the shire to parliament, and each of the remaining counties one.*

The kingdom of *Scotland*—notwithstanding the union of the crowns on the accession of their king James the sixth to that of England—continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as these kingdoms exhibited at the time of the project a very great resemblance, though far from identity, in their institutions. And this is remarked by Sir Edward Coke (*k*), who points out a conformity, in many things, not only in the religion and language of the two nations, but also in their antient laws (*l*). As to the latter particular, indeed, this resemblance did not exist at the time of the Norman conquest, for the Scottish institutions were then, according to the best authorities, exclusively Celtic, and those of England, Anglo-Saxon (*m*): but it had become established as soon afterwards as the twelfth century (*n*); and not only continued to prevail at the time of the Union, but is even yet in some particulars distinctly perceptible. The diversities of practice, however, in two large and independent jurisdictions, and the acts of two distinct parliaments, have in

4 Inst. 345.

(*l*) Blackstone says that both kingdoms "were antiently under the same government," and cites 1 Jac. 1, c. 1, as declaring that "these two mighty, famous, and antient kingdoms were formerly one."

(*m*) See Hallam's Constitutional Hist. vol. iii. p. 404, 3rd ed.

(*n*) The most antient book of Scottish law, called *Regiam Majestatem* (the authenticity of which, though once a subject of dispute, on the whole to be sufficiently established,) is so similar to the treatise of Glanvil on English law in the reign of Hen. 2, that one of them is plainly copied from the other. There seems little reason, however, to doubt that Glanvil's is the original work. As to these treatises, see Inst. ubi sup.; Erskine's Instit. b. 1, t. 1, s. 32; Robertson's Chas. V. vol. i. n. (25); Hist. Eng. Law, by Reeves, vol. i. p. 225.

process of time naturally tended to introduce great diversities; to which we may add, as a co-operative cause, the antient alliance and connection of Scotland with France, where the civil law chiefly prevailed. For to that law the Scottish jurisprudence ultimately became in many respects conformable; and particularly in all that regards contracts and commerce (*o*).

[To recur, however, to the history of the Union: this appeared to Sir Edward Coke, and the politicians of that time, to be attended (notwithstanding the similarity of the two systems of law) with great difficulties; but these were at length overcome, and the great work was happily effected in the year 1706, during the reign of Queen Anne (*p*); when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the most considerable being as follows;—that

1. On the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain (*q*).

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament (*r*).

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

(*o*) See Erskine's Instit. b. 1, t. 1, s. 41. By 19 & 20 Vict. c. 60, the laws of England and Scotland were assimilated on several miscellaneous points affecting trade and commerce.

(*p*) See the Act of Union (6 Ann. c. 11, sometimes printed 5 & 6 Ann. c. 8).

(*q*) We may here remark that by 4 & 5 Vict. c. 30; 33 & 34 Vict. c. 13, and 38 & 39 Vict. c. 32, *surveys* of Great Britain were authorized to be taken.

(*r*) There is an appellate jurisdiction in the House of Lords over the Scotch courts in civil cases, as to which see 6 Ann. c. 53; 48 Geo. 3, c. 151, and 39 & 40 Vict. c. 59, s. 3. But as to the court of *Justiciary*, see Mackintosh *v.* The Lord Advocate, Law Rep., 2 App. Ca. 41.

[9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms (*s*).

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England (*t*). But all the other laws of Scotland shall remain in force; though alterable by the parliament of Great Britain. Yet with this caution, that laws relating to public policy, are alterable at the discretion of the parliament; laws relating to private right, are not to be altered but for the evident utility of the people of Scotland.]

22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament (*u*), and forty-five members to sit in the house of commons; which number of commoners has, however, been now raised to sixty (*v*).

23. [The sixteen representative peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union; and shall have all privileges of peers, except sitting in the house of lords and voting on the trial of a peer (*w*).

These are the principal of the twenty-five articles of union, which are ratified and confirmed by statute 6 Anne, c. 11: in which statute there are also two acts of parliament recited; the one of Scotland (*x*), whereby the church of Scotland, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are

(*s*) Art. 17 of the Act of Union was repealed by 41 & 42 Vict. c. 49.

(*t*) See Maxwell *v.* Mayre, 1 Bla. Rep. 271, 364.

(*u*) 6 Ann. c. 78. And see 2 & 3 Will. 4, c. 63; 10 & 11 Vict. c. 52; 14 & 15 Vict. c. 87.

(*v*) See 2 & 3 Will. 4, c. 65, and 31 & 32 Vict. c. 48, Acts passed in the years 1832 and 1868 respectively to amend the representation of the people in Scotland.

(*w*) See Lord Mornington's case, Fort. Rep. 165; Duke of Queensberry's case, 1 Peere Wms. 582.

(*x*) 1 W. & M. c. 5 (an Act for securing the Protestant religion and Presbyterian church government).

[to take an oath inviolably to maintain the same; the other of England (*y*), whereby the Acts of Uniformity of the thirteenth year of Elizabeth and the thirteenth and fourteenth years of Charles the second (except as the same had been altered by parliament at that time), and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And it is enacted, that these two Acts "shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles and acts of union, it is to be observed (*z*)—1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union." 2. That whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be

(*y*) 5 Ann. c. 5 (an Act for securing the Church of England as by law established).

(*z*) It has not been thought convenient to modify the way in which Blackstone here expresses himself; but it will be noticed that some alteration in the act of uniformity was effected by "The Universities Tests Act, 1871" (34 & 35 Vict. c. 26), and also that the liturgy of the church of England was changed in certain particulars by "The Prayer Book (Tables of Lessons) Act, 1871" (34 & 35 Vict. c. 37). See also the 22 Vict. c. 2, abolishing the church services for some particular days.

[an infringement of these "fundamental and essential conditions." 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in certain instances, to alter them, they still (with regard to the particulars unaltered) continue in full force.] Wherefore the municipal laws of England are, generally speaking, of no force or validity in Scotland; nor, on the other hand, are those of Scotland of force or validity in England (*a*); and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any further than sometimes by way of illustration, the municipal laws of the Scottish part of the united kingdom. It is however to be observed, that acts of parliament, passed since the union, extend in general to Scotland, though that country be not expressly mentioned. If it be intended to except Scotland, there must be an express proviso to that effect, or the intention of the legislature to except it must be otherwise sufficiently indicated

The town of *Berwick-upon-Tweed* was originally part of the kingdom of Scotland; and, as such, was for a time reduced by King Edward the first into the possession of the crown of England; and, during such its subjection, it received from that prince a charter, which, (after its subsequent cession by Edward Balliol to be for ever united to the crown and realm of England,) was confirmed by King Edward the third, with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward the first. Its constitution

(*a*) Our courts do not even take judicial notice of the state of the law in Scotland; but (as in the case of a foreign country) if any question upon it happens to arise, it is considered as a matter of fact to be ascertained by evidence. (See Woodham *v.* Edwardes, 5 Ad. & El. 771; Bradlaugh *v.* De Rin, Law Rep., 5 C. P. 473.)

(*b*) Rex *v.* Cowle, 2 Burr. 853.

was new-modelled and put upon an English footing by a charter of King James the first; and all its liberties, franchises and customs were confirmed in parliament by the statutes 22 Edw. IV. c. 8, and 2 Jac. I. c. 28. Though therefore it hath some local peculiarities, derived from the antient laws of Scotland, yet it is now clearly part of the realm of England, and is accordingly duly represented by burgesses in the House of Commons (*c*). And therefore it was (perhaps superfluously) declared by statute 20 Geo. II. c. 42, s. 3, that where England only is mentioned in any act of parliament, the same notwithstanding hath and shall be "deemed to comprehend and include the town of Berwick-upon-Tweed." Berwick, however, is no part of the county of Northumberland (*d*); but forms, in some sense, a county of itself; that is, a *county of a town corporate* (*e*): as to the effect of which, the reader is referred to the observations which we shall have occasion presently to make when we come to explain the nature of counties corporate (*f*).

As to *Ireland* (*g*), its inhabitants, at the time of the conquest of that island by Henry the second, were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons (*h*). But on such conquest, the laws of England were received and sworn to by the Irish nation, assembled at the council of Lismore (*i*). And afterwards King John, in the twelfth year of his reign, went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of

(*c*) See Hale, Hist. C. L. c. 9; Rex *v.* Cowle, 2 Burr. 853; Com. Dig. Scotland (B.); Mayor of Berwick *v.* Shanks, 3 Bing. 459.

(*d*) See Rex *v.* Cowle, ubi sup.; Mayor of Berwick *v.* Shanks, ubi sup.

(*e*) See 5 & 6 Will. 4, c. 67, ss. 61, 109; 6 & 7 Will. 4, c. 103, s. 6.

(*f*) Vide post, p. 133.

(*g*) As to Ireland, see 4 Inst. 349.

(*h*) 4 Inst. 358; Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

(*i*) Pryn. on 4 Inst. 249.

conquest, is said to have ordained and established that Ireland should be governed by the laws of England (*j*); which letters patent Sir Edward Coke apprehends to have been there confirmed in parliament (*k*). But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the third (*l*) and Edward the first (*m*) were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III., under Lionel Duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of Queen Elizabeth, the wild natives still kept and preserved their Brehon law; which is described to have been "a rule of right unwritten, "but delivered by tradition from one to another, in which "oftentimes there appeared great show of equity in deter-"mining the right between party and party, but in many "things repugnant quite both to God's law and man's" (*n*). The latter part of this character is alone ascribed to it, by the laws before cited of Edward the first and his grandson.

Notwithstanding this settlement of Ireland, it was only entitled the dominion or lordship of Ireland (*o*), and the king's style was no other than *Dominus Hiberniæ*, lord of Ireland, till the thirty-third year of King Henry the eighth, when he assumed the title of king, which is recognized by act of parliament, 35 Hen. VIII. c. 3. [But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial

(*j*) See Craw *v.* Ramsay, Vaugh. 294; 2 Pryn. Rec. 85; Calvin's case, 7 Rep. 23; Campbell *v.* Hall, Cowp. 210.

(*k*) Co. Litt. 141.

(*l*) A. R. 30; 1 Rym. Fœd. 442.

(*m*) A. R. 5.—"*Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant, nobis et concilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.*" — Pryn. Rec. 1218.

(*n*) See Spenser's State of Ireland, p. 1513.

(*o*) Stat. Hiberniæ, 20 Hen. 3.

[customs (or common law) of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of King John, extended into that kingdom; unless indeed it were specially named, or included under general words, such as, "within any of the king's dominions." And this is particularly expressed, and the reason given, in the Year Books; where it is said, "a tax "granted by the parliament of England shall not bind "those of Ireland, because they are not summoned to our "parliament;" and again, "Ireland hath a parliament of "its own, and maketh and altereth laws; and our statutes "do not bind them, because they do not send knights to "our parliament (*p*); but their persons are the king's "subjects, like as the inhabitants of Calais, Gascoigne, "and Guienne, while they continued under the king's "subjection" (*q*). The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries, which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but then they are bound by its laws (*r*).

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper (*s*). But an ill use being made of this liberty, particularly by Lord Gormanstown, deputy-lieutenant in the reign of Edward the fourth (*t*), a set of statutes was enacted in the tenth year of Henry the seventh

(*p*) Lord Coke, citing this in Calvin's case, inserts the following parenthesis, *viz.* ("which is to be understood *unless specially named*"). 7 Rep. 22.

(*q*) 20 Hen. 6, 8; 2 Rich. 3, 12.

(*r*) Year Book, 1 Hen. 7, 3; Calvin's case, 7 Rep. 22.

(*s*) Irish Stat. 11 Eliz. st. 3, c. 8.

(*t*) Ib. 10 Hen. 7, c. 23.

[(Sir Edward Poynings being then Lord Deputy, they are called Poynings' laws), one of which (*u*), in order to restrain the power as well of the deputy as of the Irish parliament, provides,—1. That, before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts proposed to be passed therein; and 2. That after the king, in his council of England, shall have considered, approved or altered the said Acts or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected (*x*). But as this precluded any laws from being proposed but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences, and made frequent dissolutions necessary, it was afterwards provided by the Irish statute of 3 & 4 Ph. & Mary, c. 4, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. Still, however, there was nothing left to the parliament in Ireland, but a bare negative or power of *rejecting*, not of proposing or altering any law.] But the usage afterwards was, that bills were often framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they were offered to the consideration of the lord lieutenant and privy council: who, upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads, or rejected them without any transmission to England. With regard, however, to "Poynings' laws" in particular, none of them could be repealed or suspended unless the bill for that purpose, before it

(*u*) Irish Stat. 10 Hen. 7, c. 4, expounded by 3 & 4 Ph. & M. c. 4.

(*x*) 4 Inst. 353.

was certified to England, had been approved by both houses (*y*).

[But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming no longer uniform, it was therefore enacted by another of "Poynings' laws" (*z*), that all acts of parliament before made in England, should be of force within the realm of Ireland (*a*).] But by the same rule, that the people of Ireland were not bound by acts of the English parliament passed *before* this enactment, and not specially naming or referring to Ireland, so they were not bound by such acts of parliament passed *after* this enactment (*b*). And on the other hand it was equally clear that where Ireland *was* particularly named, or included under general words, they were bound by such acts of parliament. For this follows from the very nature and constitution of a dependent state: [dependence being very little else but an obligation to conform to the will or law of that superior person or state upon which the inferior depends. The original and true ground of this superiority, in the present case, was what we usually call, though somewhat improperly, the right of conquest; a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered,

(*y*) Irish Stat. 11 Eliz. st. 3, c. 8.

(*z*) Cap. 22.

(*a*) 4 Inst. 351.

(*b*) 12 Rep. 112. By the Act, however, of the Irish parliament, 21 & 22 Geo. 3, c. 48 (Yelverton's Act), it was enacted, that certain statutes then made in England or Great Britain, relating to the subjects therein enumerated, save so far as the same had been altered or repealed, should be accepted, used and executed in Ireland. A previous Act of the same parliament, (21 & 22 Geo. 3, c. 47, *Irish*,) would seem to repeal the provisions of 10 Hen. 7, c. 4, and 3 & 4 Ph. & M. c. 4.

[that, if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies (*c*).

But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary to declare how that matter really stood; and therefore by statute 6 Geo. I. c. 5, it was declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, had power to make laws to bind the people of Ireland.]

It was not only the parliamentary constitution of Ireland that was thus placed in a state of dependence; the same kind of inferiority attached to her courts of justice, for a writ of error (in the nature of an appeal) lay from the King's Bench in Ireland to the King's Bench in England (*d*), and an appeal from the chancery in Ireland immediately to the House of Lords here; while the peers of Ireland had no jurisdiction to affirm or reverse any judgments or decrees whatsoever (*e*).

The time however at length arrived when Ireland, impatient of a subordinate position, was enabled to assert her rights as a free and independent state. For the statute of 6 Geo. I., above mentioned, having been first repealed by 22 Geo. II. c. 53; it was, by 23 Geo. III. c. 28, declared that the parliament and courts of Ireland had an exclusive right as to all matters of legislation and judicature in that country; and this emancipation was followed, in the year 1801, by the great measure which incorporated her (like Scotland) as an integral part of the British dominions.

(*c*) Puff. Law of Nations, viii. 6, 24.

(*d*) This was law in the time of Hen. 8; as appears by the antient book, intituled *Diversity of Courts*, c. *Bank le Roy*.

(*e*) So declared by 6 Geo. 1, c. 5.

Of the articles of the Union with Ireland (39 & 40 Geo. III. c. 67) the most important provisions are these (*f*) :—

1. That the kingdoms of Great Britain and Ireland shall, on the first day of January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland.

2. That the succession to the crown of the United Kingdom shall continue the same as the succession to the crown of Great Britain and Ireland before the union.

3. That there shall be one parliament, styled the Parliament of the United Kingdom of Great Britain and Ireland.

4. That twenty-eight peers of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords of the United Kingdom; and that one hundred and five commoners shall sit in the House of Commons of the United Kingdom on the part of Ireland: that any peer of Ireland, not elected one of the twenty-eight, may serve in the House of Commons of the United Kingdom for

(*f*) These articles are contained in the statute mentioned in the text, and repeated in the Act of the Irish parliament, 40 Geo. 3, c. 38. The number of Irish members of the House of Commons under the Act of Union was 100, but by 2 & 3 Will. 4, c. 88, was raised, in the year 1832, to 105. The Act of Union also contains a stipulation that "four lords spiritual of Ireland by rotation of sessions shall sit in the House of Lords," and also the following clause:—"That the churches of England and Ireland shall be united into one Protestant episcopal church, to be called the United Church of England and Ireland: that the doctrine, worship, discipline and government of such church shall be the same as that of the church of England; that the continuance and preservation of such united church, as the established church of England and Ireland, shall be an essential and fundamental part of the union; and that the church of Scotland shall remain the same as established by the Acts of Union of England and Scotland." The Act of Parliament, however, which in the year 1870 put an end to the connection of the church of Ireland with that of England, and deprived the archbishops and bishops of the church of Ireland of the right to sit in the House of Lords, made the articles of the Act of Union which refer to this subject, of less importance. The momentous change above referred to, was carried into effect by the 32 & 33 Vict. c. 42, as to which Act, see 35 & 36 Vict. cc. 13, 90, and 42 & 43 Vict. c. 67.

any county, city or borough of Great Britain; but, while so serving, shall not be entitled to privilege of peerage, or to be elected one of the twenty-eight, or to vote at such election: and that all the peers of Ireland, (except those who may be members of the House of Commons of the United Kingdom,) shall have all privilege of peerage as fully as those of Great Britain;—the right of sitting in the House of Lords (with its attendant privileges) only excepted.

5. That the subjects of Great Britain and Ireland shall all be entitled to the same privileges with regard to trade and navigation (*g*), and also in respect of all treaties with foreign powers.

6. That the future expenditure of the united kingdom shall be defrayed in such proportion as the parliament thereof shall from time to time deem just and reasonable, according to certain rules prescribed for that purpose in the Act of Union.

7. That all the laws and courts of each kingdom shall remain the same as already established, subject to such alterations and regulations as circumstances may appear to the parliament of the united kingdom to require; but that all writs of error and appeals which might, before the union, have been decided in the House of Lords of either kingdom, shall henceforth be decided by the House of Lords of the united kingdom (*h*).

Finally, it is to be observed, that since the union all Acts of Parliament extend to Ireland, whether that portion of the united kingdom be mentioned or not, unless it be expressly excepted, or the intention to except it be otherwise plainly shown.

With regard to the other adjacent Islands, which are subject to the Crown of Great Britain, some of them (as

(*g*) See Attorney-General *v.* M'Kenzie, 11 Price, 284.

(*h*) See the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3.

the Isles of Wight (*i*), Portland, Thanet, &c.) are comprised within some neighbouring county, and are therefore to be looked upon as annexed to the mother island and to be part of the kingdom of England (*k*). But there are others not so annexed which require a more particular consideration.

And first, the Isle of Man is a distinct territory from England, and is not, in general, governed by our laws (*l*), but by acts of its own local legislature, the *House of Keys;* neither does any Act of Parliament extend thereto, unless it be specially named (*m*); nor (the writ of *habeas corpus* excepted) does process run there from the English courts (*n*). [It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to King John and Henry the third of England; afterwards to the kings of Scotland; and then again to the crown of England; and then at length we find king Henry the fourth claiming the island by right of conquest, and disposing of it to the Earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 Hen. IV. (*o*). In his lineal descendants it continued for eight generations, till

(*i*) The Isle of Wight, for the purpose of *parliamentary representation*, is a county of itself, separate from Hampshire, and returns one member; (see 2 Will. 4, c. 45, s. 16).

(*k*) Com. Dig. Navigation, F. 5; 4 Inst. 287.

(*l*) See Com. Dig. Navigation, F. 2; Co. Litt. 9 a; Calvin's case, 7 Rep. 21; 4 Inst. 283.

(*m*) 4 Inst. 284; 2 And. 116. As to the *excise* in the Isle of Man, see 7 & 8 Geo. 4, c. 53, s. 3. As to *customs* there, see 27 & 28 Vict. c. 62; 29 & 30 Vict. c. 23; 37 & 38 Vict. c. 46; 39 & 40 Vict. c. 36. As to *probate commissioners* for the island, 21 & 22 Vict. c. 95, s. 30; as to its *harbours*, 26 & 27 Vict. c. 86; 27 & 28 Vict. c. 62; 29 & 30 Vict. c. 23; 35 & 36 Vict. c. 23; 37 & 38 Vict. c. 8. As to *costs in revenue proceedings* there, 25 & 26 Vict. c. 14. As to *forest claims* there, 28 & 29 Vict. c. 28. As to the operation there of the "*Ecclesiastical Leasing Acts*, 1842 and 1858," 29 & 30 Vict. c. 81. As to the 7 Will. 4 & 1 Vict. c. 45, s. 6, not applying there, 33 & 34 Vict. c. 51. As to the *superannuation of officers* there, 39 & 40 Vict. c. 43.

(*n*) See Re Brown, 33 L. J. (N. S.) Q. B. 193.

(*o*) Selden, Tit. Hon. 1, 3.

[the death of Ferdinando, Earl of Derby, A.D. 1594; when a controversy arose concerning the inheritance thereof between his daughters and William his surviving brother; upon which, and a doubt that was started concerning the validity of the original patent (*p*), the island was seized into Queen Elizabeth's hands, and afterwards various grants were made of it by King James the first, all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William Earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by Act of Parliament, with a restraint of the power of alienation by the said Earl and his issue male. On the death of James, Earl of Derby, A.D. 1735, the male line of Earl William failing, the Duke of Atholl succeeded to the island as heir general by a female branch. In the meantime, though the title of king had long been disused, the Earls of Derby, as lords of Man, had maintained a sort of royal authority therein, by assenting or dissenting to laws and exercising an appellate jurisdiction; though an appeal lay from their decrees to the sovereign of Great Britain in council (*q*). But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws and smugglers,) authority was given to the treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors for the use of the Crown. And this purchase was at length completed in the year 1765,—and confirmed by statutes 5 Geo. III. cc. 26 and 39,—whereby the whole island and all its dependencies so granted as aforesaid, (except the landed property and some other rights of the Atholl family,) became unalienably vested in the Crown (*r*).

(*p*) Camden, Eliz. A.D. 1594.

(*q*) Christian *v.* Corren, 1 P. Wms. 329.

(*r*) An additional compensation for this cession was afterwards granted to the Duke of Atholl by 45 Geo. 3, c. 123. And see 6 Geo. 4, c. 34.

[The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, (often called the Channel Islands,) were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line (*s*). They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an antient book of very great authority, intituled *Le Grand Coustumier* (*t*). The writ or process of the sovereign from the English courts is in ordinary cases of no force in these islands (*u*); but his commission is (*v*). They are not bound by common Acts of the English parliament, unless particularly named. All causes are determined in the first instance by their own officers, the bailiffs and *jurats* of the islands (*w*); but appeal lies from them to the sovereign in council in the last resort.]

From these adjacent islands we may now extend our view to the more distant possessions or dependencies of the British Crown in various quarters of the globe. Most of these are usually called *colonies*, and whenever in the course of what follows that term is used, it is to be understood as referring to them all (*x*). Colonies are no part of the mother country, but distinct (though dependent) dominions. In general, they are either gained from other states by conquest or treaty; or else they are acquired by right of occupancy only, that is, by finding them desert and uncultivated, and peopling them from the mother country.

(*s*) As to these, see 4 Inst. 286; Calvin's case, 7 Rep. 20 b; Martin *v.* M'Culloch, 1 Moore, Priv. Counc. Rep. 308.

(*t*) See Hale, Hist. Com. Law, c. 6.

(*u*) Inst. ubi sup. It may be observed, however, that a writ of *habeas corpus ad subjiciendum* lies into the Channel Islands, under the provisions of 31 Car. 2, c. 2, and 56 Geo. 3, c. 100. (See Carus Wilson's case, 7 Q. B. 984.)

(*v*) As to appointing probate commissioners there, see 21 & 22 Vict. c. 95, s. 30.

(*w*) As to the *jurats* and the constitution of the Royal Court of Jersey, see Law Rep., 1 P. C. 94; Williams *v.* Stevens, ib. 352.

(*x*) As to the term "colony," see 28 & 29 Vict. c. 63, s. 1; c. 113, s. 1; c. 116, s. 1.

Both the right by conquest or cession and that by occupancy are founded upon the law of nature, or at least upon that of nations. But there is a difference between the two species of colonies, with respect to the laws by which they are bound. For in conquered or ceded countries that have already laws of their own, those laws remain in force until changed by competent authority (*y*); and the common law of England, as such, has no allowance or authority there: [while, on the other hand, it has been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being—which are the birthright of every subject (*z*)—are immediately there in force (*a*). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony; such for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.]

The sovereign exercises, as to colonies of every description, the right of appointing governors (*b*), and of issuing warrants for the appointment of officers, whether judicial, administrative or ecclesiastical (*c*). The right of legislation,

(*y*) Campbell *v.* Hall, Cowp. 204; 2 P. Wms. 75; Rex *v.* Vaughan, 4 Burr. 2500.

(*z*) See Campbell *v.* Hall, ubi sup.

(*a*) Blankard *v.* Galdy, Salk. 411; S. C. 4 Mod. 215; see Smith *v.* Brown, Salk. 666.

(*b*) The term "governor" of a colony is defined in 26 & 27 Vict. c. 84, s. 2. As to the *retiring pensions* of colonial governors, see 28 & 29 Vict. c. 113; 35 & 36 Vict. c. 29.

(*c*) We may observe here, that, of late years, *bishops* have been appointed for the colonies; as to whom, see 31 Geo. 3, c. 31; 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33;

too, is in some cases vested in the Crown; for any colony which has been acquired by conquest or cession is subject to such laws as the sovereign in council may impose (*d*), or to such as may be imposed by any legislative council established in the colony under the royal authority. This does not extend, however, to colonies acquired by occupancy; for in these the Crown possesses no such legislative right. The sovereign may, nevertheless, in any colony, however acquired, direct the governor to summon a representative assembly, from among the inhabitants themselves, for the purpose of interior legislation; and it is an established principle, that a conquered or ceded colony, to which the Crown has once thus granted a representative legislature, is no longer subject to legislation by the Crown (*e*). Such would seem, in a general point of view, to be the extent of the royal power in the colonies acquired either by conquest, cession, or occupancy; but in connection with this subject, it is proper also to notice "The Foreign Jurisdiction" Acts (*f*), by one of which (6 & 7 Vict. c. 94, s. 3) it was declared that it shall be lawful for her majesty to exercise any power or jurisdiction that she may have within any country or place *out* of her dominions, in the same and in as ample a manner as if such power or jurisdiction had been obtained by cession or conquest (*g*): and that everything done in pursuance of such power or jurisdiction in any place out of her majesty's dominions, shall within her dominions be deemed to be, to all intents and purposes,

5 & 6 Vict. c. 4, s. 119; 15 & 16 Vict. cc. 52, 53, 88; 16 & 17 Vict. c. 49. (See Re the Bishop of Natal, 3 Moo. P. C. (N. S.) 115; and Bishop of Natal *v.* Gladstone, Law Rep., 3 Eq. Ca. 1.) As to the colonial clergy, see also 37 & 38 Vict. c. 77.

(*d*) Calvin's case, 7 Rep. 17 b; Campbell *v.* Hall, Cowp. 211.

(*e*) Campbell *v.* Hall, ubi sup.; Att.-Gen. *v.* Stewart, 2 Meriv. 158. As to powers of colonial legislatures, see 26 & 27 Vict. c. 84; 28 & 29 Vict. c. 63, s. 5. See also Phillips *v.* Eyre, Law Rep., 6 Q. B. 1.

(*f*) The statutes so named form a group, commencing, in 1843, with 6 & 7 Vict. c. 94, and ending, in 1878, with 41 & 42 Vict. c. 67.

(*g*) See also 28 & 29 Vict. c. 116; 29 & 30 Vict. c. 87; 36 & 37 Vict. c. 59, and 38 & 39 Vict. c. 85.

as valid as if done according to the local law then in force within such place; and further, that if in any proceedings, civil or criminal, it shall become necessary, in the opinion of the presiding judge, to produce evidence of the existence of such power or jurisdiction, questions properly framed shall be transmitted to a principal secretary of state, and his answer shall be final and conclusive evidence of the matters therein contained, and required to be ascertained thereby.

Such being the nature of the authority of the Crown in our colonial possessions (as to which authority we may add that it is exercised through the agency of a principal secretary of state, called secretary of state for the colonies), it is almost superfluous to remark that they are all, under all circumstances and whatever may be their political constitution, subject to the legislative control of the British parliament. It was the exercise by parliament of this general right, for the particular purpose of raising a revenue by colonial taxation, that led to that famous dispute between the mother country and her North American provinces, which ultimately terminated in their independence (*h*). The existence of the right in this, as in other cases, was during the controversy asserted by the Act 6 Geo. III. c. 12, which declared that all his majesty's colonies or plantations in America were subordinate to, and dependent upon, the imperial crown and parliament of Great Britain, and liable to be bound by its laws and statutes, in all cases whatsoever; though by a subsequent statute (18 Geo. III. c. 12), it was thought expedient to add that no power of taxation as regarded America would for the future be exercised for the benefit of the mother country, a principle which has been since maintained with regard to all of our colonial possessions.

(*h*) By 22 Geo. 3, c. 46, his majesty was empowered to conclude a truce or peace with these colonies; and by a definitive treaty signed at Paris, 3rd September, 1783, acknowledged the United States of America to be free, sovereign and independent.

But the general right of the mother country to legislate for the colonies is (excepting in the matter of taxation) still preserved, and is recognised in the Colonial Laws Validity Act, 1865 (*i*), which has enacted that (in effect) any colonial law that is repugnant to an act of the imperial legislature extending to the particular colony shall be void to the extent of the repugnancy.

Though it is competent to parliament to legislate for the colonies, yet a colony is not considered as affected by Acts of Parliament passed after its acquisition, and while it is subject to other legislative authority, (whether that of the sovereign in council, or of a local council, or assembly,) unless it be referred to in the Act, by name, or by general description, such as "the colonies;" or unless the Act be, in its nature, obviously intended to affect all our possessions wherever situate. In the case of a colony acquired by occupancy, Acts of Parliament passed before its acquisition, come into force immediately upon that event, as part of the general law of England,—as to all provisions at least not unsuitable to its social circumstances. But a colony won by conquest or cession, is not in general affected by statutes of the united kingdom passed before its acquisition.

Such being the general principles of law applicable to colonies, we may next advert to the actual constitution of those which at present belong to the British Crown (*j*).

(*i*) 28 & 29 Vict. c. 63.

(*j*) As to these, see the following Acts:—

Africa, 1 & 2 Geo. 4, c. 28; 6 & 7 Vict. c. 13; 21 & 22 Vict. c. 35. *Africa* (*South*), 40 & 41 Vict. c. 47. *Africa* (*West*), 1 & 2 Geo. 4, c. 28; 16 & 17 Vict. c. 86; 24 & 25 Vict. c. 31; 34 & 35 Vict. c. 8. *America*, 6 Geo. 3, c. 12; 59 Geo. 3, c. 38; 1 & 2 Geo. 4, c. 66; 16 & 17 Vict. c. 107, ss. 181, 185, 187; 22 & 23 Vict. c. 26; 35 & 36 Vict. c. 45. *Australia*, 18 & 19 Vict. c. 56; 24 & 25 Vict. c. 44; 36 & 37 Vict. c. 22. *Australia* (*South*), 5 & 6 Vict. c. 61; 13 & 14 Vict. c. 59; 24 & 25 Vict. c. 44; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *Australia* (*West*), 13 & 14 Vict. c. 59; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *British Columbia*, 22 & 23 Vict. c. 26; 29 & 30 Vict. c. 67; 33 & 34 Vict. c. 66. *British Kaffraria*, 28 & 29 Vict. c. 5. *Canada*, 14 Geo. 3, cc. 83, 88; 1 & 2 Geo. 4,

And here a great variety is observable. In every case they are subject to a local governor (the representative

c. 66; 6 Geo. 4, cc. 59, 75; 9 Geo. 4, c. 51; 3 & 4 Vict. c. 35; 14 & 15 Vict. c. 63; 19 & 20 Vict. c. 23; 20 & 21 Vict. c. 34; 30 & 31 Vict. c. 3; 31 & 32 Vict. c. 135; 32 & 33 Vict. c. 11, s. 7; c. 101; 34 & 35 Vict. c. 28; 38 & 39 Vict. cc. 38, 53. *Cape of Good Hope*, 28 & 29 Vict. c. 5; 40 & 41 Vict. c. 17. *China*, 3 & 4 Will. 4, c. 93; 22 & 23 Vict. c. 9. *Falkland Islands*, 6 & 7 Vict. c. 13. *Hong Kong*, 18 & 19 Vict. c. 104. *Leeward Islands*, 34 & 35 Vict. c. 107. *New Brunswick*, 14 & 15 Vict. c. 63; 20 & 21 Vict. c. 34; 30 & 31 Vict. c. 3; 38 & 39 Vict. c. 38. *Newfoundland*, 49 Geo. 3, c. 27; 59 Geo. 3, c. 38; 5 Geo. 4, c. 67; 6 Geo. 4, c. 59; 2 & 3 Will. 4, c. 78; 5 & 6 Vict. c. 120; 12 & 13 Vict. c. 21; 35 & 36 Vict. c. 45. *New South Wales*, 54 Geo. 3, c. 15; 9 Geo. 4, c. 83; 5 & 6 Will. 4, c. 62; 3 & 4 Vict. c. 62; 5 & 6 Vict. c. 76; 7 & 8 Vict. c. 74; 12 & 13 Vict. c. 22; 13 & 14 Vict. c. 59; 18 & 19 Vict. c. 54; 24 & 25 Vict. c. 44; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *New Zealand*, 3 & 4 Vict. c. 52; 9 & 10 Vict. c. 103; 10 & 11 Vict. c. 112, s. 19; 11 & 12 Vict. c. 5; 12 & 13 Vict. c. 79; 13 & 14 Vict. c. 70; 14 & 15 Vict. cc. 84, 86; 15 & 16 Vict. c. 72; 20 & 21 Vict. c. 53; 25 & 26 Vict. c. 48; 26 & 27 Vict. c. 23; 31 & 32 Vict. cc. 57, 92. *Norfolk Island*, 4 & 5 Will. 4, c. 65. *Nova Scotia*, 30 & 31 Vict. c. 3; 38 & 39 Vict. c. 38. *Queen's Land*, 24 & 25 Vict. c. 44. *Straits Settlements*, 3 & 4 Vict. c. 56; 11 & 12 Vict. c. 21; 18 & 19 Vict. c. 93; 20 & 21 Vict. c. 75; 29 & 30 Vict. c. 115; 30 & 31 Vict. c. 45, s. 17; 32 & 33 Vict. c. 88; 33 & 34 Vict. c. 55; 37 & 38 Vict. c. 38. *Vancouver's Island*, 12 & 13 Vict. c. 48. *Van Diemen's Land*, 6 Geo. 4, c. 39; 9 Geo. 4, c. 83; 5 & 6 Vict. c. 76, s. 53; 7 & 8 Vict. c. 74, s. 6; 10 & 11 Vict. c. 57; 13 & 14 Vict. c. 59; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *Victoria*, 54 Geo. 3, c. 15; 2 & 3 Vict. c. 70; 5 & 6 Vict. c. 76; 7 & 8 Vict. cc. 72, 74; 13 & 14 Vict. c. 59; 18 & 19 Vict. c. 55; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. Moreover, with respect to the WEST INDIES, we may notice the following Acts: *For the relief of certain Colonies and plantations therein*, 2 & 3 Will. 4, c. 125; 5 & 6 Will. 4, c. 51; 3 & 4 Vict. c. 40; 7 & 8 Vict. c. 17; 8 & 9 Vict. c. 50; 11 & 12 Vict. c. 38; 19 & 20 Vict. c. 35: *For the sale of encumbered estates therein*, 17 & 18 Vict. c. 117 (amended and continued by 21 & 22 Vict. c. 96; 25 & 26 Vict. c. 45; 27 & 28 Vict. c. 108; 35 & 36 Vict. c. 9): *For regulating the prisons there*, 1 & 2 Vict. c. 67: *For increasing the number of bishoprics therein*, 5 & 6 Vict. c. 4 (see 31 & 32 Vict. c. 120): *For establishing courts of appeal for certain of the West India Islands*, 13 & 14 Vict. c. 15: *For enabling Her Majesty to confirm an act passed by Antigua as to Barbuda*, 22 & 23 Vict. c. 13: *To authorize the extension of a loan by West India relief commissioners to Dominica*, 30 & 31 Vict. c. 91: *As to loan to Jamaica*, 25 & 26 Vict. c. 55; 32 & 33 Vict. c. 69: 42 & 43 Vict. c. 16: *For the government of the Cayman Islands*, 26 & 27 Vict. c. 31: *To make provi-*

and deputy of the sovereign), who acts under the royal commission, and the royal instructions by which the commission is usually accompanied (*k*). In every case, too, the law is administered by local judges, deriving their authority from, but not in all cases appointed by, the crown; and an appeal is universally allowed from the decision of those judges to the sovereign in council, here in England. But in other particulars our present colonies differ widely from each other in their plan of government, some of them having received the gift of English laws, others remaining subject to the codes of foreigners, their former masters; some remaining under the legislative power of the crown itself, and others receiving their laws from a local legislative council, or from representative assemblies, established by authority of the crown or of parliament. With respect to those possessing assemblies of this description, (which are a numerous class,) it may be said that their whole interior policy is in general closely modelled upon that of the mother country. For having a governor (the representative of royalty), and royal courts of justice, they have also a local council, forming a sort of upper house, in addition to their general assembly, corresponding with our House of Commons: who, by their united authority, make laws suited to the emergencies of the colony (*l*). This, however, is subject to such restriction as necessarily results from the subordination of these local establishments to the crown and the imperial parliament. For Acts of assembly not only require the assent of the governor as representing the crown, before they can come even into temporary operation, but are liable to be afterwards annulled by a notification from this country of their having been *disalloced* by the sove-

sion for the government of Jamaica, 29 & 30 Vict. c. 12: *To annex the Turks and Caicos Islands to the colony of Jamaica*, 36 & 37 Vict. c. 6: *Constitutions of St. Vincent, Tobago and Grenada*, 39 & 40 Vict. c. 47.

(*k*) See 28 & 29 Vict. c. 63, s. 4, as to *instructions to the colonial government from the mother country.*

(*l*) Vide post, bk. IV. pt. I. c. V.

reign in council (*m*). This subject is now also partly regulated by a recent Act (28 & 29 Vict. c. 63), passed "to remove doubts as to the validity of colonial laws," it being by that statute declared that any colonial law *repugnant* in any respect to the provisions of any Act of Parliament extending to the colony (or of any order or regulation which has in such colony the force of an Act of Parliament,) shall be void and inoperative, but only to the extent of such repugnancy (*n*); while, on the other hand, no colonial law, *unless* so made void and inoperative, shall be affected by its repugnancy to the law of England (*o*). It is further provided by the same Act, that every *colonial* legislature may establish courts and regulate the administration of justice in the colony, and that every *representative* legislature may make laws as to its own constitution, powers, and procedure (*p*).

Thus much as to our settlements in general (*q*). But

(*m*) Clark's Colonial Law, 41.

(*n*) 28 & 29 Vict. c. 63, s. 2.

(*o*) Sect. 3. See also 16 & 17 Vict. c. 107, s. 190.

(*p*) By 28 & 29 Vict. c. 63, the term "colonial legislature" is to include any authority (other than the imperial parliament or her Majesty in council) which is competent to make laws for the colony. And any colonial legislature, which shall comprise a legislative body of which one half is elected by the inhabitants of the colony, is (by the same statute) to be deemed a *representative* legislature.

(*q*) We may, also, here notice the following statutes, containing recent regulations applicable to our colonies *in general*. As to *the apprehension of fugitive offenders*, 44 & 45 Vict. c. 49. As to *evidence*, 6 & 7 Vict. c. 22. As to *letters-patent*, 26 & 27 Vict. c. 76. As to the *jurisdiction of the admiralty*, 12 & 13 Vict. c. 96; 23 & 24 Vict. c. 88. As to the *post-office*, 12 & 13 Vict. c. 66. As to the *proof of acts of state and legal proceedings*, 14 & 15 Vict. c. 49, s. 7. As to the *revenues of the crown*, 15 & 16 Vict. c. 39. As to *lighthouses*, 18 & 19 Vict. c. 91. As to *crown lands, and the emigration commissioners*, 18 & 19 Vict. c. 119. As to *the ascertainment of the law*, 22 & 23 Vict. c. 63; 24 & 25 Vict c. 11. As to *the trial of criminals*, 23 & 24 Vict. c. 122. As to writs of *habeas corpus*, 25 & 26 Vict. c. 20. As to certain *Acts of legislatures*, 26 & 27 Vict. c. 84. As to their *naval defence*, 28 & 29 Vict. c. 14. As to *the validity of certain marriages*, 28 & 29 Vict. c. 64. As to *gold coins from branch mints*, 33 & 34 Vict. c. 10. As to the *registration of ships*, 31 & 32 Vict. c. 129. As to the *prevention*

there is a large class of them in the West Indies and elsewhere, which require our separate attention, on account of their connection with the former system of colonial slavery. From the earliest period of their acquisition, their produce had been raised by the compulsory labour of the negro race, and notwithstanding the peculiar freedom of her own institutions, and the pure form of Christianity which she professes, the mother country, until early in the present century, had never hesitated to lend her sanction to that iniquitous method of cultivation (*r*). The conscience of the British public was, however, at length awakened to the atrocity of the traffic by which the plantations were continually supplied with new victims from the coast of Africa; and at a later period to the nature of the colonial bondage itself, which was shown to exceed even the servile system of Pagan Rome in severity, and to be without parallel in the history of human oppression. The slave trade, after a long and obstinate opposition from the parties interested, was abolished in 1807 (*s*) —and after another protracted interval, during which the duty of ameliorating the condition of the negroes in the colonies was confided (but in vain) to the local legislatures, the imperial parliament at length resolved to put an end, from 1st August, 1834, to the system of slavery itself—which was carried into effect by an Act passed in

of kidnapping, 35 & 36 Vict. c. 19, amended by 38 & 39 Vict. c. 51. As to the *trial of crimes committed out of the local jurisdiction*, 37 & 38 Vict. c. 27. As to *stock*, 40 & 41 Vict. c. 59. As to *fortifications, works, buildings and land*, 40 & 41 Vict. c. 23.

(*r*) Several of our statutes gave sanction to this system, as already established by the local laws of the colonies (see Forbes *v.* Lord Cochrane, 2 Barn. & Cress. 469); yet the condition of slavery has been long pronounced by our courts to be repugnant to the genius of the municipal law of England; see the case just cited, and the case of Somersett, 11 St. Tr. 340; Lofft, 1.

(*s*) 47 Geo. 3, st. 1, c. 36. The foreign slave trade, viz. the supply of foreign countries with slaves, was abolished in 1806, by stat. 46 Geo. 3, c. 52; and the supply of our own conquered colonies had been previously forbidden by order in council in 1805.

1833 (*t*). To justify this measure, however, it was thought necessary to award to the slave proprietors the sum of twenty millions sterling, in compensation for the loss of service sustained,—and also to interpose a certain period of probation during which the slaves, instead of passing suddenly into absolute liberty, should be considered as apprentices, and held in that qualified species of subjection to their former masters. But in the result, the masters themselves found it expedient to abandon the system of apprenticeship before the prescribed time had expired; and, by acts of their own legislature throughout the different colonies, admitted their apprentices into the state of pure freedom at a period somewhat earlier than they would otherwise have been entitled to its enjoyment (*u*).

Our possessions in India are also entitled, from their superior extent and importance, to specific notice. In 1708 two rival associations existed in England for the purposes of East India traffic; but in that year they were consolidated into one by Act of Parliament (*x*), with an exclusive privilege of trading to the East Indies and other specified places (*y*);—a privilege afterwards renewed by many successive grants. This body was originally incorporated by the name of "The United Company of Merchants of England trading to the East Indies," but convenience attached to them the shorter appellation of "The East India Company," which afterwards became by express provision their proper legal style (*z*). In the progress of their well-known history, they crushed upon the Indian peninsula the power of the rival settlers from France; and though first instituted for purposes merely

(*t*) 3 & 4 Will. 4, c. 73.

(*u*) Besides the Acts above cited, see also the following, connected with the subject of slavery and its repression, 9 Geo. 4, c. 84; 5 & 6 Will. 4, c. 45; 6 & 7 Will. 4, c. 5, c. 16, c. 82; 7 Will. 4 & 1 Vict. c. 91; 4 & 5 Vict. c. 18; 16 & 17 Vict. c. 86; 36 & 37 Vict. c. 59, c. 88; 39 & 40 Vict. c. 46; and 42 & 43 Vict. c. 38.

(*x*) 6 Ann. c. 71, s. 13.

(*y*) See 9 & 10 Will. 3, c. 44, s. 81.

(*z*) 3 & 4 Will. 4, c. 85, s. 111.

commercial, their policy, as administered by the governors whom they sent out, gradually led to the acquisition of immense territorial dominions, by which they became effectively (though subject to the undoubted supremacy of the British Crown) the sovereigns of India (*a*). The unexampled grandeur of this company rendered the regulation of its affairs, for a long period of our history, an object of the highest interest and importance to the British nation. In consequence of the prevalence of great abuses, its constitution was newly arranged in 1773 by an Act of Parliament (*b*), prescribing the manner in which its Directors should be chosen from among its members, and the qualification which should entitle a member to vote in its affairs (*c*). In 1784 its administration of the East was brought under the superintendence of the executive government at home, by the establishment of the Board of Commissioners for the affairs of India, which operated as a check upon the Directors, and was afterwards generally called the "Board of Control" (*d*). Still, however, its commercial monopoly remained entire; but in 1813 it was provided by the Act then passed for the temporary renewal of the company's charter, that the trade from all places except China, and in all commodities except tea, should be thrown open (under certain restrictions and limitations) to every subject of the realm (*e*). And this proved but the prelude to a still more important change, for the expediency being at length generally recognized of admitting the capital of our private merchants to a free participation in every branch of the Indian traffic, an arrangement was accordingly made with the company for that purpose in 1832. This was

(*a*) See Gibson *v.* East India Company, 5 Bing. N. C. 272; Mayor of Lyons *v.* East India Company, 1 Moore, Priv. Counc. Rep. 374.

(*b*) 13 Geo. 3, c. 63, explained and amended by 21 Geo. 3, c. 70.

(*c*) 13 Geo. 3, c. 63, s. 5.

(*d*) 24 Geo. 3, sess. 2, c. 25, and see 26 Geo. 3, c. 16, and 23 Geo. 3, c. 52.

(*e*) 53 Geo. 3, c. 155, s. 7.

carried into effect by the statute 3 & 4 Will. IV. c. 85; under which such exclusive rights of trading as the company still retained were abolished, and they were debarred from engaging for the future in commercial transactions (*f*). And though the territories and other property in their possession, with the exception of St. Helena (which was by the same statute vested in the crown), were allowed to remain under the government of the company, this was declared to be "in trust" only for "his majesty, his heirs and successors" (*g*). As for the local government of India, it was committed to a governor-general and a board of councillors, who, under the style of "The Governor-General of India in Council" (*h*), were invested with a superintending authority over all the local governments called Presidencies, in all points relating to their civil and military administration (*i*); and with power to make laws for all persons, whether British or native, throughout the whole of the territories, and for all servants of the company within the dominions of allied states (*j*); subject however to a power in the Court of Directors to disallow any law so made (*k*); and also subject to the superintending and paramount authority of the imperial parliament (*l*). The ecclesiastical establishment of India was also remodelled by the same Act, and it made provision for founding two bishoprics—those of Madras and Bombay—in addition to the diocese of Calcutta, already established. The Bishop of Calcutta, however, was declared to be the metropolitan bishop in India, with such jurisdiction and functions as the sovereign by letters patent should direct, subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury (*m*). By 3 & 4 Will. IV. c. 85,

(*f*) 3 & 4 Will. 4, c. 85, s. 3.

(*g*) Sects. 1, 2.

(*h*) Sect. 39. As to the powers of the Governor-General of India in Council, see also 32 & 33 Vict. c. 98.

(*i*) 3 & 4 Will. 4, c. 85, s. 65.

(*j*) Sect. 43.

(*k*) Sect. 44.

(*l*) Sect. 81.

(*m*) Sect. 94. See also the Acts referred to, sup. p. 102, n. (*c*). As to Indian bishops *on furlough*, see 34 & 35 Vict. c. 62, and 37 & 38 Vict. c. 13.

the territories of India were to continue under the government of the East India Company until 30th April, 1854, but before the arrival of that time it was provided by another statute (16 & 17 Vict. c. 95) that even after that time these territories should so continue until parliament should otherwise provide. Such new provision, however, was in fact shortly afterwards made, and it was hastened by circumstances of an unexpected and disastrous kind. The Sepoy soldiery in India, having been led early in 1857 to entertain the belief that government was about to compel them in the course of their military duty to bite cartridges greased with the fat of certain animals (an act abhorrent from the Hindoo superstition, and fatal to caste), broke out into open mutiny, which soon ripened into an extensive rebellion of the natives in general against the British power, in the course of which many fearful atrocities were committed by them, and which was not suppressed till the close of 1858. Under these circumstances it appeared to parliament in the course of that year that a time had now arrived at which, for the more effectual administration of affairs, it was expedient that the crown should take to itself the sole and unqualified dominion over India; and by 21 & 22 Vict. c. 106 (intituled An Act for the better Government of India) it was accordingly provided that all powers and rights vested in the East India Company in trust for her Majesty should cease, and should become vested in her and be exercised in her name (*n*); and, conformably to this, the Act was soon afterwards followed by a proclamation of the Queen in council to the princes, chiefs and people of India, in which she formally claimed their allegiance.

This Act contains—besides the establishment of its general principle (*o*), and the determination of the functions and powers theretofore vested in the Court of Direc-

(*n*) Some years later, viz., in 1874, the Company was dissolved by Act of Parliament, 36 & 37 Vict. c. 17.

(*o*) 21 & 22 Vict. c. 106, s. 1.

tors and Court of Proprietors in relation to the government of India (*p*), and the abolition of the Board of Control (*q*), and the provision that all persons who then held offices, employments or commissions, under the company in India, should thenceforth be deemed to hold them under her Majesty and be paid out of the revenues of India (*r*)—a variety of enactments as to the manner in which the business to be transacted in this country, in relation to the Indian government, and the correspondence therewith, should in future be conducted (*s*). But of these our limits enable us to say no more, than that such business and correspondence are to be conducted by a principal secretary of state in council (*t*); and that such council—of which he is to be president, with a power himself to vote (*u*)—is to consist of fifteen members under the style of the "Council of India," by way of distinction from the council of the governor-general already established in that country (*x*); and that the members of the council are to be salaried (*y*), and are to hold office during good behaviour (*z*), but are not to be capable of sitting or voting in parliament (*a*). It will be expedient, however, to specify another of the enactments of this statute, namely, that all Acts and provisions then in force, under charter or otherwise concerning India, shall, subject to the provisions of the statute, continue in force; and be construed as referring to the secretary of state in council, in lieu of the company and the court of directors and court of proprietors thereof (*b*).

(*p*) 21 & 22 Vict. c. 106, s. 60.
(*q*) Sect. 61.
(*r*) Sect. 58.
(*s*) Sect. 19.
(*t*) Sects. 3, 21.
(*u*) Sect. 21.
(*x*) Sect. 7.
(*y*) Sect. 13.
(*z*) Sect. 11.
(*a*) Sect. 12. As to the constitution of the "Council of India," see also 39 & 40 Vict. c. 7.
(*b*) 21 & 22 Vict. c. 106, s. 64. Some of the principal statutes relating to India *prior* to 1858 are referred to sup. pp. 110, 111. In addition to those, the following may be here noticed. As to administration of justice, 37 Geo. 3, c. 142; 39 & 40 Geo. 3, c. 79; 4 Geo. 4, c. 71; 6 Geo. 4, c. 85; 9 Geo. 4, c. 74. As to trade with India and

With a view to the recognition of the transfer of government from the East India Company to her Majesty by the 21 & 22 Vict. c. 106, above mentioned, it was subsequently thought expedient that an appropriate alteration should take place in the style and titles appertaining to the Imperial Crown of the United Kingdom and its dependencies; and accordingly, under the 39 & 40 Vict. c. 10, and a Royal Proclamation made under its authority, her Majesty, in the year 1876, added to her previous style and title the words "Empress of India."

We have now noticed such parts of the dominions of the crown of Great Britain, as are not within the full and proper jurisdiction of the English laws.

[With regard to any *foreign* dominions which may happen in the course of events to belong to the person of the sovereign by hereditary descent, by purchase or other acquisition—as these do not in anywise appertain to the crown of these kingdoms, so they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever.

China, 3 & 4 Will. 4, c. 93; 3 & 4 Vict. c. 56; 16 & 17 Vict. c. 107, ss. 327, 329; 17 & 18 Vict. c. 104, s. 108. As to the directors, the presidencies, the governor-general and his council, and the age, qualifications and appointment of members of the civil or military service of the company, 5 & 6 Will. 4, c. 52; 16 & 17 Vict. cc. 95, 107; 17 & 18 Vict. c. 77.

The statutes relating to India which have passed *since* the 21 & 22 Vict. c. 106, comprise the following:—As to revenue, &c., 22 Vict. c. 11; 22 & 23 Vict. c. 39; 23 & 24 Vict. cc. 5, 102, 130; 24 & 25 Vict. cc. 3, 25, 118; 25 & 26 Vict. c. 7; 26 & 27 Vict. c. 73; 32 & 33 Vict. c. 106; 34 & 35 Vict. c. 29; 36 & 37 Vict. c. 32; 37 & 38 Vict. c. 3; 40 & 41 Vict. c. 51. As to the army and naval force, 23 & 24 Vict. c. 100; 29 & 30 Vict. 47; 31 & 32 Vict. c. 38; 37 & 38 Vict. c. 61. As to the civil service, 24 & 25 Vict. c. 54; 33 & 34 Vict. c. 3. As to the council of the governor-general, and the government of the presidencies and provinces, &c., 24 & 25 Vict. c. 67; 28 & 29 Vict. c. 17; 32 & 33 Vict. cc. 97, 98; 33 & 34 Vict. c. 3; 34 & 35 Vict. c. 34; 37 & 38 Vict. c. 91. As to the courts of justice, &c., 24 & 25 Vict. c. 104; 28 & 29 Vict. c. 15; 34 & 35 Vict. c. 34; 37 & 38 Vict. c. 27. As to the "elder widows' fund," 36 & 37 Vict. c. 17; 41 & 42 Vict. c. 47.

[We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing Commentaries. But first let us observe that the main or high seas are, in one sense, part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shown hereafter; but they are not subject to the common law (*c*). This main sea begins at the low water-mark. But between the high water-mark and the low water-mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium*, an alternate jurisdiction; one upon the water, when it is full sea, the other upon the land, when it is an ebb (*d*).

The territory of England is liable to two divisions; the one ecclesiastical, the other civil (*e*).

I. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops (*f*); and every diocese is divided into archdeaconries, each archdeaconry into rural deaneries, and every rural deanery is divided into parishes (*g*).

(*c*) Co. Litt. 260. The extent of Admiralty jurisdiction in respect of offences committed by foreigners within three miles of the English coast was much discussed in the case of the Queen *v.* Keyn, Law Rep., 2 Ex. D. 63, and has now been made the subject of express legislation. See 41 & 42 Vict. c. 73 (The Territorial Waters Jurisdiction Act, 1878).

(*d*) Finch, L. 78; Constable's case, 5 Rep. 107 a.

(*e*) As to the territorial divisions of England, some valuable information will be found in the preface to the Population Abstract of 1831, vol. i. p. xiv.

(*f*) Bishops are here termed "suffragan" (a word signifying *deputy*) in relation to their archbishop (Co. Litt. by Harg. 94 a, note (3)). As to "suffragan bishops" in relation to the bishop of their diocese, vide post, bk. IV. pt. II. c. I. It may be remarked that bishopries or dioceses are almost as antient as the introduction of Christianity. Of those now extant, the greater number were formed in Saxon or in British times. (Report on Religious Worship, p. xxxvii.) See 35 & 36 Vict. c. 14, an Act for the alteration of the *boundaries* of dioceses.

(*g*) Co. Litt. 94. The number

[A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein (*h*). How antient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that, in the early ages of Christianity in this island, parishes were unknown, or at least signified the same that a diocese does now (*i*). There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion (*k*).

Mr. Camden says, England was divided into parishes by Archbishop Honorius, about A.D. 636 (*l*). Sir Henry Hobart lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179 (*m*). Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shown (*n*) that the clergy lived in common, without any division of parishes, long after the time

of parishes and population of each diocese in 1831 are given in the Population Abstract of that year (vol. i. p. xix.)

(*h*) "*Parochia est locus in quo degit populus alicujus ecclesiæ.*"—5 Rep. 67 a, Jeffery's case. (See Sharpley *v.* Overseers of Maplethorpe, 3 Ell. & Bl. 906.) It is stated in the Population Abstract of 1831, (vol. i. p. xviii.) that the number of parishes and parochial chapelries at that period in England and Wales might, for any general purpose, be safely taken at 10,700.

(*i*) See Chitty's Blackstone, vol. i. p. 106, n.; and 3 Burn, Ec. L. 60, 7th ed.; Hall. Mid. Ages, vol. ii. p. 205, 7th ed.

(*k*) Seld. of Tith. 9, 4; 2 Inst. 646; Slade *v.* Drake, Hob. 296. As to the modern law of tithes, see 6 & 7 Will. 4, c. 71, et post, bk. IV. pt. II. c. III.

(*l*) See Camden's Britannia, vol. i. p. ccxxviii.

(*m*) Slade *v.* Drake, ubi sup. And see Bishop of Winchester's case, 2 Rep. 44 b.

(*n*) Seld. of Tithes, c. 9.

[mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary;* that is, every man paid his own, (as was before observed,) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was ordered by a law of King Edgar, that "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet*" (*o*). However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister: but if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primaria ecclesia* or mother-church (*p*).

This proves that the kingdom was then generally divided into parishes, which division happened probably not all at once, but by degrees. And it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service

(*o*) C. 1.

(*p*) C. 2. See also the Laws of King Canute, c. 11, about the year 1030.

[regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish,—which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands, especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forest and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day *extra-parochial;* and their tithes are now by immemorial custom payable to the king, instead of the bishop, in trust and confidence that he will distribute them for the general good of the Church (*q*).]

As a parish is an ecclesiastical division, so the persons who bear the chief authority in a parish, as such, viz. the rector, (or vicar, or perpetual curate,) and the churchwardens, are also of an ecclesiastical character; and the nature of their offices and duties is a subject that consequently belongs not to the present part of the work, but to

(*q*) 2 Inst. 647; Bishop of Winchester's case, 2 Rep. 44; Wright *v.* Wright, Cro. Eliz. 512. In the Population Abstract of 1831 (vol. i. p. xxii.) more than two hundred extra-parochial places are mentioned, and it is stated that they are usually found to have been the site of royal palaces, religious houses or antient castles. See 20 Vict. c. 19, an Act to provide for the relief of the poor and other purposes in extra-parochial places. And as to the repair of the highways in such places, 25 & 26 Vict. c. 61, s. 32.

that division in which we shall have occasion to treat of the law of the Church (*r*). It is material, however, to observe, here, both as to parishes and parochial officers, that though primarily and properly they have relation to ecclesiastical purposes, yet there are some secular aspects in which they also require to be considered. For there has been a gradual tendency, more particularly in modern times, to treat a parish as a civil, not less than an ecclesiastical division. Thus the collection of the poor-rate, or fund for the relief of the poor, and in a general point of view its application also, is *parochial;* and the case is the same with respect to several other species of local taxation (*s*). The affairs of a parish, as such, (whether civil or ecclesiastical,) are regulated in *vestry*, which is properly speaking, an assembly of the minister, churchwardens and parishioners,—that is, of such of the parishioners as contribute to the public burden (*t*)—and which, from being commonly held in the "vestry" adjoining or belonging to the church, takes its name from thence, as the place itself does from the priest's vestures, which are usually deposited there (*u*). The vestry is summoned, or called together, by the churchwardens, with the consent of the minister (*x*); who has been generally considered as entitled, when pre-

(*r*) Vide post, bk. IV. pt. II.

(*s*) See 23 & 24 Vict. c. 51, providing for an annual return of taxes, rates, tolls and dues levied for local purposes; in which, however, the *poor's-rate* is not included.

(*t*) Steer's Par. L. 253.

(*u*) By 13 & 14 Vict. c. 57, the Poor Law Board may, upon application of the churchwardens, pursuant to a resolution of vestry in any parish where the population exceeds 2000 by the then last census, make an order that no meeting shall be held in the parish church except for divine worship or some ecclesiastical or charitable object or purpose approved by the bishop; nor in the vestry room attached to the church, except in cases of urgency and with previous approval of the Poor Law Board; but that the same shall be held in such other room as shall be provided within the parish. And by 24 & 25 Vict. c. 125, provisions are made for the purchase by the overseers with the consent of the vestry (in parishes whose population exceeds 4000) of fit offices for the transaction of parish business.

(*x*) Steer's Par. L. 252.

sent, to preside at the meeting (*y*): and its principal rights and duties are those of investigating and controlling the expenditure of the parochial funds, and electing certain of the parochial officers, though there are various other matters in which it possesses an authority (*z*). We here speak of its original character at common law: but it is liable to modifications in particular places by force of special custom or enactment (*a*); and is regulated besides by the general Vestry Act, 58 Geo. III. c. 69 (*b*),—amended by 59 Geo. III. c. 85, and by 16 & 17 Vict. c. 65. By these statutes (*c*), a vestry is not to be summoned except on three days' notice (*d*); and when it meets, a chairman is to be appointed, unless the rector, vicar, or perpetual curate, is present; and the chairman shall have the casting-vote and sign the minutes of the proceedings. They also contain provisions as to the right of voting; which is adjusted upon a certain scale, having relation to the amount in which the voter is assessed to the relief of the poor (*e*). The constitution of vestries is moreover in some places regulated by 1 & 2 Will. IV. c. 60 (*f*); which provides for the election, by the rate payers, of a certain number of vestrymen and auditors, under whose manage-

(*y*) Wilson *v.* Math, 3 B. & Ald. 241, n. (*b*); see Mawley *v.* Barbet, 2 Esp. 687.

(*z*) Steer's Par. L. 257; and see 58 Geo. 3, c. 69, s. 6; 1 & 2 Will. 4, c. 60, ss. 27, 39.

(*a*) Steer's Par. L. 260; and see Golding *v.* Fenn, 7 Barn. & Cress. 765; R. *v.* Brain, 3 B. & Adol. 614; R. *v.* St. Martin's in the Fields, ibid. 907; R. *v.* Clerkenwell, 1 Ad. & Ell. 317.

(*b*) Known as "Sturges Bourne's Act." (See Reg. *v.* D'Oyly, 12 A. & E. 139.)

(*c*) These Acts do not extend to London or Southwark, or to any parish created under the Church Building Acts for ecclesiastical purposes only, and not separately maintaining its own poor. (See The Queen *v.* Barrow, Law Rep., 4 Q. B. 577.)

(*d*) By 7 Will. 4 & 1 Vict. c. 45, the notice for calling a vestry is to be affixed on or near the church door, without any publication (as formerly) in the parish church.

(*e*) As to voters in arrear of rates, see 16 & 17 Vict. c. 65. As to the manner of voting, see R. *v.* Rector of Birmingham, 7 Ad. & El. 254.

(*f*) Known as "Sir J. Hobhouse's Act." (See Reg. *v.* Hedger, 12 A. & E. 157.)

ment the parochial accounts are to be kept and audited (*g*). This statute has no application, however, to parishes not forming part of a city or town, and not having more than 800 rate payers: and the adoption of its arrangements is in no case compulsory: no parish being subject to them unless it voluntarily consents to place itself under the Act. There is a statute also of 59 Geo. III. c. 12, which empowers parishes to establish vestries of a certain description for the management of the poor; and, as far as their relief is concerned, the bodies so appointed supersede the authority of the ordinary parish officers: though they are themselves, on the other hand, by a subsequent enactment, made subject to the control of the Poor Law Board (*h*).

On the subject of parishes it only remains to be observed, that, by certain statutes lately passed for extending church accommodation, and making more effectual provision for the cure of souls (*i*),—it is provided, that by such authorities and under such circumstances, and with such consents, as therein specified, any part or parts of any parish may be constituted a separate *district* (*k*), for spiritual purposes; and that any parish may also be divided into

(*g*) R. *v.* St. Pancras Trustees, 5 Nev. & M. 219; R. *v.* Vestry of St. Mary-le-bone, 5 Ad. & El. 268. By 18 & 19 Vict. c. 120, s. 1, the stat. 1 & 2 Will. 4, c. 60, is repealed as to *the metropolis*; and vestries of a new constitution created there.

(*h*) See 4 & 5 Will. 4, c. 76, ss. 21, 54; 10 & 11 Vict. c. 109, s. 10; Queen *v.* Green and others, 21 L. J. (M. C.) 137. See also 13 & 14 Vict. c. 57, enabling the Poor Law Board upon application of the churchwardens, pursuant to a resolution of vestry, in any parish where the population exceeds 2000 by the then last census, to make an order for the appointment of a *paid vestry clerk*, whose duties the Act defines.

(*i*) The most important of these statutes are 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 6 & 7 Will. 4, c. 77; 3 & 4 Vict. c. 113; 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. cc. 55, 104. (See also as to division into separate *benefices*, 1 & 2 Vict. c. 106, s. 16; 2 & 3 Vict. c. 49, s. 6.) A further account of these statutes will be found, post, bk. IV. pt. II. c. IV.

(*k*) See 6 & 7 Vict. c. 37, s. 10; 7 & 8 Vict. c. 56, s. 6, as to the registration of a map or plan of the boundaries of districts formed under these Acts.

two or more distinct and separate parishes, for all ecclesiastical purposes whatsoever (*l*). In pursuance of which provisions many such new constitutions and divisions have, for purposes of that description, accordingly taken place (*m*). And thus much for the ecclesiastical division of this kingdom.

II. [The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. This division is of remote and undefined antiquity; and was not peculiar to England, similar distributions having been in use among several nations of the continent (*n*). As to the tithings, they were so called, from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king, for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming (*o*). And therefore antiently no man was suffered to abide in England, above forty days, unless he were enrolled in some tithing or

(*l*) Some of the Acts also authorized the establishment within these divisions, of a species of select vestry for ecclesiastical purposes (see 59 Geo. 3, c. 134, s. 30; 3 Geo. 4, c. 72, s. 10). But the select vestries authorized by these Acts are abolished by 14 & 15 Vict. c. 97, s. 23.

(*m*) With respect to parishes, it may be proper also to notice the useful provisions of certain late statutes (see 2 & 3 Vict. c. 62, ss. 34—36; 3 & 4 Vict. c. 15, s. 28; 8 & 9 Vict. c. 118, s. 39; and 12 & 13 Vict. c. 83), whereby the antient boundaries between parishes and townships may be adjusted, or in other cases new boundaries defined (see R. *v.* Madeley, 15 Q. B. 43). There are also the stat. 5 & 6 Vict. c. 18, authorizing the sale of parish property and paying parish debts out of the poor rate;—the 19 & 20 Vict. c. 50, enabling parishioners, &c. to sell advowsons held by or in trust for them;—and the 23 & 24 Vict. c. 30, enabling two-thirds of the ratepayers of a parish to make rates for maintaining public walks, &c. therein.

(*n*) The division has been ascribed to Alfred, but Mr. Hallam questions his claim to the distinction, and observes that counties are mentioned in the Laws of Ina. (See Hallam's Middle Ages, vol. ii. pp. 389, 402.)

(*o*) Flet. 1, 47.

[decennary (*p*). One of the principal inhabitants of the tithing was annually appointed to preside over the rest, being called the tithingman, the headborough, (words which speak their own etymology,) and in some counties, the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing (*q*).

Tithings, towns, or vills, are of the same signification in law; and are said to have had each of them originally a church and celebration of divine service, sacraments and burials: though that seems to be rather an ecclesiastical than a civil distinction (*r*). The word *town* (*s*) or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it several species and varieties.] Taken in this sense, towns are distinguished from each other as being either corporate or not corporate; the townsmen forming, in the first kind, a *corporation*, that is, a society, with certain legal properties and capacities, on the nature of which we shall treat at large in a subsequent division of these Commentaries; and shall at the same time consider the provisions of the Act for regulating municipal corporations (45 & 46 Vict. c. 50), by the effect of which, all towns of this description are now placed under one uniform plan of internal government (*t*). There are also market-towns, that is, towns which are entitled to hold markets; and there are others which have not that franchise. And, lastly, towns are divided into cities, boroughs, and common towns. The cities of this kingdom are certain towns of principal note and importance, all of which either are or have been sees of bishops; yet there seems to be no

(*p*) Mirr. c. 1, s. 3.
Jac. Dict. v. Headborough.
Co. Litt. 115 b.

(*s*) As to the legal meaning of the word "town," see Elliott *v.* South Devon Railway Company, 2 Exch. 729; Ex parte Incumbent, &c. of Brompton, 22 L. J., N. S. (Ch.) 281; London and South Western Railway Company *v.* Blackmore, Law Rep., 4 H. of L. Ca. 611.

(*t*) As to municipal corporations, vide post, bk. IV. pt. III. c. I.

necessary connexion between a city and a see (*u*); and it is certain, that though the bishopric be dissolved, as at Westminster, yet still it remaineth a city (*x*). A borough is a city or other town that sends (or hath sent) burgesses to parliament (*y*), a privilege the nature of which we shall more fully explain hereafter, in that part of the work which relates to Parliament (*z*). According to Sir Edward Coke, there were in his time, in England and Wales, 8,803 towns, or thereabouts (*a*). [To several of them there are small appendages belonging, called hamlets; which are taken notice of in the statute of Exeter (14 Edw. I.), wherein frequent mention is made of "entire vills," "demi-vills," and "hamlets." Entire vills, Sir Henry Spelman conjectures, to have consisted of ten freemen or frank-pledges, demi-vills of five, and hamlets of less than five (*b*). These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, for some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish and one tithing; though many of them now,

(*u*) See 1 Woodd. 302; Jac. Dict. *in tit.* City.

(*x*) Co. Litt. 109 b. The town of *Westminster* was by express creation made a city by Hen. VIII. when he also made it the seat of one of the new bishopries he founded out of the revenues of the dissolved monasteries; but it was restored to the diocese of London in the reign of Edw. VI.; and Elizabeth, by authority of parliament, turned Westminster into a collegiate church, subject to a dean. See Chitty's Black. vol. i. p. 109, *n.*; 2 Burn, Ecc. Law, 542, 7th ed.; Co. Litt. by Harg. 109 b, n. (3).

(*y*) 1 Bl. Com. 114; Litt. s. 164; Co. Litt. 108 b, 109 a. See also the Reform Act of 1832 (2 Will. 4, c. 45), s. 79. In the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, "borough" expresses a corporate town, whether sending representatives to parliament, or not; and in the Municipal Corporations Act, 45 & 46 Vict. c. 50, it is "any city or town to which the Act applies." In 31 & 32 Vict. c. 41 (The Borough Electors Act, 1868), the term "parliamentary borough" is to mean a borough which prior to the Representation of the People Act, 1867, returned a member or members to parliament; and a "municipal borough" a place subject to the provisions of 5 & 6 Will. 4, c. 76.

(*z*) As to the parliament, vide post, bk. IV. pt. I. c. I.

(*a*) Co. Litt. 116 a.

(*b*) Gloss. 274.

[by the increase of inhabitants, are divided into several parishes and tithings; and, sometimes, where there is but one parish there are two or more vills or tithings.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by a high constable or bailiff (*c*); and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse (*d*). In some of the more northern counties these hundreds are called wapentakes (*e*).

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl or alderman, (as the Saxons called him,) of a shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex (*f*), each of them containing about three or four

(*c*) As to high constables, however, see 32 & 33 Vict. c. 47. Blackstone says (vol. i. p. 115), that the division of *hundreds* obtained formerly in Denmark and in France, each hundred being subject to a *centenarius*, over a number of whom presided a *comes* or count. He adds, that in France the division was instituted by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division; and we may remark that in our own country, the *hundred* is made by statute answerable for the riotous and tumultuous demolition of churches and certain other building and machinery, and for plunder of wreck.

(*d*) As to the hundred court, vide post, bk. v. c. iv.

(*e*) Seld. in Fortesc. c. 24. Wapentakes are so called because the people at a public meeting confirmed their union with the governor by touching his *weapon* or lance. (See Wilk. Leg. Ang.-Sax. Ll. Edw. c. 33; Christian's Blackstone, vol. i. p. 115, *note;* Cowell's Dict. v. Wapentake.)

(*f*) The rapes of Sussex are said

[hundreds a-piece (*g*). These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings, which were antiently governed by a trithing-reeve (*h*). These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west riding. The number of counties in England and Wales have been different at different times; at present they are forty in England and twelve in Wales (*i*).]

It seems probable that the realm was originally divided into counties, with a view to the convenient administration of justice; for we find that the judicial business of the kingdom was in early times chiefly dispatched in local courts, held in each different county, before the sheriff, as its principal officer (*k*). These antient courts are still occasionally held for certain purposes, but retain nothing of their former consequence, and are not now entrusted with the local administration of justice. Yet the distribution into counties is to this day materially connected with the course of judicial proceedings. For the county

to have been military governments in the time of the Conqueror; the lathes of Kent to have been civil jurisdictions, and of earlier date.—(Population Abstract, 1831, vol. i. p. xv.)

(*g*) For some purposes connected with magisterial business, certain counties are severed into *divisions*. (See 10 Geo. 4, c. 46; 6 & 7 Will. 4, c. 12; 22 & 23 Vict. c. 65; and 28 & 29 Vict. c. 37.) The number of places in England and Wales where petty sessions or divisional meetings are usually held, were returned in 1831 as amounting to 609.—(Population Abstract, ubi sup.)

(*h*) Wilk. Leg. Ang.-Sax. Ll. Edw. c. 34.

(*i*) A particular place, parcel of one county, is sometimes detached from it, and surrounded by another. By 7 & 8 Vict. c. 61, these detached parts are annexed, for all purposes, to the counties of which they form a part, for the purpose of parliamentary representation. As to the jurisdiction of magistrates with respect to detached parts of counties, see 2 & 3 Vict. c. 82, and 21 & 22 Vict. c. 68; and as to the union of liberties with counties, see 13 & 14 Vict. c. 105.

(*k*) Hickes, Thes. Diss. Epist.; Reeves's Hist. Eng. L. vol. i. pp. 6, 7.

courts of modern institution, now so largely entrusted with civil jurisdiction, are established in reference to this territorial division, there being for each county one of these courts held in one or more places within its limits; and in the case of the investigation of crime (*l*), the trial is, as the general rule, conducted in the county wherein the offence is alleged to have been committed (*m*); and such trials take place before the judges and commissioners of assize, who take periodical circuits throughout England and Wales; or else before the justices of the peace for the county, who exercise a jurisdiction in criminal cases at their quarter sessions. Another important object connected with the distribution into counties, is that of parliamentary representation, inasmuch as every county sends to the House of Commons its own members, called knights of the shire,—who represent their respective counties, as the borough members do their respective towns; though, by a new arrangement, the larger counties are now subdivided, each portion forming a separate county (so far as this purpose is concerned), and sending its separate representative (*n*). For the object of local taxation, too, the division into counties is of practical effect and importance; for as each parish is subject to a rate for relief of

(*l*) Formerly actions in the superior courts of a local character were tried in the county in which the cause of action arose. But there is now no local venue in actions brought in the High Court of Justice, and the place of trial is arranged in a different way. (See 38 & 39 Vict. c. 77, schd. I. ord. XXXVI. r. 1.)

(*m*) By 4 & 5 Will. 4, c. 36, was established the "Central Criminal Court," for trial of offences committed in London, Middlesex, and some parts of Essex, Kent, and Surrey; and by 19 & 20 Vict. c. 16, persons charged with offences committed elsewhere may, nevertheless, be ordered to be tried in that court. And by the Mutiny Acts, persons subject to those acts may be tried in any place where they may be found after the commission of the offence. These provisions may be considered as by way of exception to the principle stated in the text. See also the 39 & 40 Vict. c. 57, extended by 40 & 41 Vict. c. 46; and 42 & 43 Vict. c. 1, uniting counties together for the purpose of trying prisoners.

(*n*) 2 & 3 Will. 4, c. 45, ss. 12, 13, 14, and see 24 & 25 Vict. c. 112, ss. 1, 7.

the poor, so is every county to a county rate, which is levied on the occupiers of land within the county under the authority of various acts of parliament (*o*), and applied to many miscellaneous purposes (*p*).

[Three counties, viz. Chester, Durham, and Lancaster, are counties *palatine*. The two former are such by prescription or immemorial custom, or at least as old as the Norman Conquest (*q*); the latter was created a county palatine by King Edward the third, in favour of Henry Plantagenet, first Earl and afterwards Duke of Lancaster (*r*); whose heiress being married to John of Gaunt, the king's son, the franchise was greatly enlarged and confirmed in parliament, to honour John of Gaunt himself (*s*); whom, on the death of his father-in-law, the king had also created Duke of Lancaster (*t*). Counties palatine are so called *a palatio*, because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had formerly in those counties *jura regalia* as fully as the king in his palace; *regalem potestatem in omnibus*, as Bracton expresses it (*u*). They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace: all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to

(*o*) See 22 Hen. 8, c. 5; 12 Geo. 2, c. 29; 55 Geo. 3, c. 51. As to borrowing money on Middlesex county rate, see 8 & 9 Vict. c. 32. As to the assessment and collection of county rate, see 7 & 8 Vict. c. 33; 15 & 16 Vict. c. 81; 21 & 22 Vict. c. 33; 29 & 30 Vict. c. 78; and East Looe *v.* Cornwall, 3 Best & Smith, 20. See also 5 & 6 Will. 4, c. 76, s. 92; 17 & 18 Vict. c. 71, as to borough rates *in the nature* of county rates.

(*p*) See County Rate Com. Rep. (16 June, 1836). Among the purposes to which the county rate is applied, are the maintenance of the rural police, lunatic asylums, gaols and bridges. As to borrowing money for county purposes, see 35 & 36 Vict. c. 7, and 38 & 39 Vict. c. 83.

(*q*) Seld. Tit. Hon. 2, 5, 8.

(*r*) Pat. Rot. 25 Edw. 3, p. 1, m. 18; Seld. ubi sup.; Sandford's Gen. Hist. 112; 4 Inst. 204.

(*s*) Cart. Rot. 36 Edw. 3, m. 9.

(*t*) Pat. Rot. 51 Edw. 3, m. 33; Case of Duchy of Lancaster, Plowd. 215; 7 Rym. 138.

(*u*) L. 3, c. 8, s. 4.

[be done against their peace, and not, as in other places, *contra pacem domini regis* (*x*). As to which indeed it may be remarked that by the antient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried: in a court leet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* in the sheriff's court or tourn, *contra pacem vice-comitis* (*y*). These palatine privileges, so similar to the independent regal jurisdictions usurped by the great barons on the continent during the weak and infant state of the first feodal kingdoms in Europe (*z*), were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland; in order that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire (the latter now united with Northumberland), but these were abolished by parliament; the former in the twenty-seventh year of Henry the eighth, the latter in the fourteenth year of Elizabeth. In the twenty-seventh year of Henry the eighth, moreover, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance having in a manner ceased (*a*).] And in modern times, alterations have taken place in regard to the administration of justice in the counties palatine, which have assimilated them in that matter to the rest of England. Thus by 11 Geo. IV. & 1 Will. IV. c. 70, the jurisdiction of the court of session of the county palatine of Chester was abolished, and the county subjected in all things to the jurisdiction of the superior

(*x*) 4 Inst. 205.
(*y*) Seld. in Heng. Magn. c. 2.
(*z*) See Robertson, Cha. V. i. 60.
(*a*) Inst. ubi sup.

courts at Westminster; and by the Judicature Act, 1873, the jurisdiction of the Court of Common Pleas of Lancaster and the Court of Pleas of Durham was transferred to the High Court of Justice by that Act established (*b*).

It is also to be remarked, that of the counties palatine none now remains in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Henry the third, and has ever since been one of the titles of the sovereign's eldest son (*c*); and the palatine jurisdiction of Durham, which was long vested in the Bishop of Durham for the time being, was taken from him by 6 & 7 Will. IV. c. 19 (amended by 21 & 22 Vict. c. 45), and vested as a separate franchise and royalty in the crown. [As to the county palatine or duchy of Lancaster, it was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from King Richard the second, and assumed the title of Henry the fourth. But he was too prudent to suffer his duchy to be united to the crown; lest if he lost the one he should lose the other also. For as Plowden (*d*) and Sir Edward Coke (*e*) observe, "he knew he had the duchy of "Lancaster by sure and indefeasible title, but that his "title to the crown was not so assured: for that after the "decease of Richard the second the right of the crown was "in the heir of Lionel Duke of Clarence, *second* son of "Edward the third; John of Gaunt, father to this Henry "the fourth, being but the *fourth* son." And therefore he procured an Act of Parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered and governed in

(*b*) 36 & 37 Vict. c. 66, s. 16. As to the *chancery* court of the county palatine of Lancaster, see 13 & 14 Vict. c. 43; and 21 & 22 Vict. c. 27.

(*c*) Camden's Britannia, vol. iii. p. 46.

(*d*) P. 215.

(*e*) 4 Inst. 205.

[like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry the fifth and Henry the sixth: many new territories and privileges being annexed to the duchy by the former (*f*). Henry the sixth being attainted in the first year of Edward the fourth, this duchy was declared in parliament to have become forfeited to the crown (*g*); and at the same time an Act was made to incorporate the duchy of Lancaster, to continue the county palatine—which might otherwise have determined by the attainder (*h*),—and to make the same parcel of the duchy: and, further, to vest the whole in king Edward the fourth and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in the first year of Henry the seventh, another Act was made to resume such part of the duchy lands, as had been dismembered from it in the reign of Edward the fourth; and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form and condition, separate from the crown of England and possession of the same, as the three Henrys and Edward the fourth, or any of them, had and held the same

With regard to the isle of Ely, we may observe that this was never a county palatine, though sometimes erroneously called so. It was, however, a royal franchise; the Bishop of Ely having been formerly entitled, by grant of King Henry the first, to *jura regalia* within the district,

(*f*) Parl. 2 Hen. 5, m. 50; 3 Hen. 5, m. 15.

(*g*) Fisher *v.* Batten, 1 Ventr. 155.

(*h*) 1 Ventr. 1157.

(*i*) As to the effect of this Act, see Plowd. 220, 1, 2; Lamb. Archeion, 233; 4 Inst. 206. We may notice here that by 18 & 19 Vict. c. 58, the chancellor and council of the Duchy of Lancaster are enabled to sell and purchase land on behalf of her Majesty in right of the Duchy. And that by 30 & 31 Vict. c. 102, s. 57, the county of Lancaster has, for certain purposes connected with its *parliamentary representation*, ceased to be a county palatine.

whereby he exercised a jurisdiction over all causes as well criminal as civil (*k*). But by 6 & 7 Will. IV. c. 87 (amended by 7 Will. IV. & 1 Vict. c. 53), this secular authority of the bishop was taken away and vested in the crown.

[There are also counties *corporate*—otherwise called *counties of cities or towns*—which are certain cities and towns, some with more, some with less territory annexed, to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates (*l*), so that no officers of the county at large have any power to intermeddle therein (*m*).] As counties corporate constitute no part of the counties in which they are locally situate, so they had formerly, in general, no share in voting for the members to serve for those counties in parliament. However, thirteen of the number are now included within their respective counties, so far as regards the right of election for knights of the shire (*n*). To which we may add, that by 38 Geo. III. c. 52, all offences committed in a county corporate may be tried in the next adjoining county at large (*o*); a regulation from which certain towns and cities indeed were at first excepted, but almost the whole of these exceptions were repealed by the Act of 1835, for regulating municipal corporations (*p*),—a repeal which is continued by the Municipal Corporations Act, 1882.

(*k*) 4 Inst. 220; see Grant *v.* Bagge, 3 East, 128.

(*l*) As to sheriffs of counties corporate, see 5 & 6 Will. 4, c. 76, s. 61; and 6 & 7 Will. 4, c. 105, s. 5; and now 45 & 46 Vict. c. 50.

(*m*) See 3 Geo. 1, c. 15; 5 & 6 Will. 4, c. 76, ss. 61, 109.

(*n*) 2 & 3 Will. 4, c. 45, s. 17.

(*o*) See also 14 & 15 Vict. c. 55, ss. 19, 21—24; and c. 100, s. 23.

(*p*) 5 & 6 Will. 4, c. 76, s. 109. Other provisions as to *counties corporate* not requiring specific notice in the text are contained in 51 Geo. 3, c. 100; 60 Geo. 3 & 1 Geo. 4, c. 4, s. 6; 7 Geo. 4, c. 64, s. 25; 9 Geo. 4, c. 61; 5 & 6 Will. 4, c. 76, s.

Thus much of the countries subject to the laws of England; the consideration of which involves, in a general point of view, that of the *persons* also, to whom these laws are applicable. For it is to be observed that all persons found within these territories fall under the operation of these laws, though in different degrees: British subjects —that is, persons born within any part of the dominions of the crown, (and in some cases their descendants also, though born in foreign parts,) and persons naturalized by Act of Parliament—being in a full and absolute sense entitled to the rights conferred by these laws, and liable to the obligations they impose; but aliens (or those who are not British subjects) in a limited sense only, as we shall have occasion more particularly to explain hereafter (*q*).

113; 2 & 3 Vict. c. 72; 17 & 18 Vict. c. 35; and see now the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

(*q*) See 33 & 34 Vict. c. 14, an Act passed to amend in certain points the law relating to the legal condition both of aliens and of British subjects. Of this statute we shall have occasion to speak further in our second volume, where some account is given of the legal position of aliens in this country.

NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK I.

OF PERSONAL RIGHTS.

In a disquisition of such extent and variety as that on which we are about to enter, it is obviously of the first importance to lay down a proper preliminary arrangement of the subject; and the plan of division which appears to be most suitable to a treatise of this description, is one founded on a consideration of the nature of municipal law in the abstract, and of the objects or purposes towards which it is directed. It will be necessary, therefore, to recur for a moment to the views taken of this subject in a preceding part of the work.

We have seen that municipal law is a rule of civil conduct prescribed by the supreme power in a state (*a*); whose authority to prescribe it has been referred to the contract implied in civil society, that its members should submit to certain restraints of their natural freedom, in order to secure to each the enjoyment of defined liberties and advantages; and these we have comprehended under the general name of rights (*b*). It results from these considerations, that in every country, the true and proper

(*a*) Vide sup. p. 25. (*b*) Vide sup. p. 29.

objects of the law consist in the establishment and maintenance of the *rights*, severally due to the different members of the community.

The idea of rights however naturally suggests the correlative one of *wrongs;* for every right is capable of being violated. A right to receive payment for goods sold (for example) implies a wrong on the part of him who owes, but withholds, the price; and a right to live in personal security implies a wrong on the part of him who commits personal violence. And, therefore, while in a general point of view the law is intended for the establishment and maintenance of rights, we find it on closer examination to be dealing both with rights and wrongs. It first fixes the character and definition of rights, and then, with a view to their effectual security, proceeds to define wrongs, and to devise the means by which the latter shall be prevented or redressed.

These considerations form the most convenient basis upon which to construct the principal division of the laws of England; and we shall therefore sever them (like former writers) into two portions, one of which regards *Rights*, and the other *Wrongs* (*c*).

But, again, if rights be analyzed, they will be found to consist of several kinds. For, first, they are such as regard a man's own person; secondly, such as regard his dominion over the external and sensible things by which he is surrounded; thirdly, such as regard his private relations, as a member of a family; fourthly, such as regard his social state or condition as a member of the community: the first of which classes may be designated as *personal rights*, the second, as *rights of property*, the third, as *rights in private relations*, and the fourth, as *public rights*.

In these divisions of rights, it is to be observed, that we everywhere mean to include the converse or reciprocal consideration of *duties*. For whatever is due *to* one man,

(*c*) See the Preface to Hale's Analysis of the Laws of England, and 1 Com. vol. i. p. 122.

or set of men, is necessarily due *from* another. Thus the right of one man to receive from another the price of a commodity sold, casts upon the latter the duty of paying that price; and the general right of each individual to live in personal security, implies the converse duty on the part of others not to subject him to any violence. The party too, who possesses the right, is in general himself subject to some resulting duty. Thus the people have a right to live under the form of government established by law, and are under a corresponding duty of submission to that government. In the discussion of rights, therefore, it is often necessary to speak also of duties. Indeed, it is under the aspect of duties principally, that some rights require to be considered.

To avoid, however, any misapprehension from the use of the term "duties," we may remark that there are some duties which have no connection with rights in the sense which we have affixed to the latter expression; and of such duties our law consequently takes no cognizance. These are such as the law of God or conscience prescribes, but the violation of which by the individual is attended with no direct mischief to others. Thus public sobriety is a duty recognized by the law, having regard to the right of each citizen to be protected from disgusting or contaminating exhibitions of vice; but private sobriety is not enforced by any legal sanction; because secret intoxication, though equally opposed, with open drunkenness, to conscience and the law of God, is no violation of any human right, nor its commission, if by any means detected, a fit subject for human punishment.

Wrongs also may be subdivided; but as regards these we are necessarily led to adopt a different principle of distribution. For the leading distinction here depends not on the character of the right violated, but on the party who is supposed to sustain injury from its violation. According to the view which our law takes of this subject, the violation of a right may in some instances amount to

an injury to the particular individual only, but in others it may take the character of an injury to the public at large (*d*). When viewed in the first aspect, it is usually called a *civil injury*, when in the last, a *crime*. Thus the withholding of a debt, is a wrong to the individual; and consequently a civil injury; but it is considered as not affecting the public; and therefore it is no crime. On the other hand, to deprive a man of his money by theft or robbery, is held to be a wrong to the public, and therefore a crime; though it is also a civil injury, if considered in relation to the damage which the party individually sustains. The considerations which tend to determine whether a given species of wrong shall be treated as an injury to the individual, or as an injury to the public, constitute a subject upon which it would be premature to enter in this place, and which belongs to a later portion of the treatise. It is sufficient at present to have thus stated the general nature of the distinction between civil injuries and crimes, and to remark that it is one of great practical importance; for the law deals very differently with the two kinds of wrong; the former being merely a subject for *redress*, the latter for *punishment*.

The extensive subject under consideration appearing thus naturally to resolve itself into the several divisions above indicated, we shall adopt them for the purpose of the present work; and our method, or order of discussion, will be as follows:—

Book I. Of Personal Rights.
II. Of Rights of Property.
III. Of Rights in Private Relations.
IV. Of Public Rights.
V. Of Civil Injuries; including also the modes of Redress which the law provides for them.
VI. Of Crimes; comprising also the modes of Criminal Prosecution.

(*d*) See 4 Bl. Com. pp. 5, 6.

We are now first to consider Personal Rights, or those which relate to a man's own person. As these are the most important, so are they also the most simple of all that are secured to men by the institutions of society; and the law has been much less frequently employed in fixing their definition and boundaries, than in devising redress or punishment in case of their violation. The discussion of these rights will consequently lie in a comparatively narrow compass. They consist of two principal or primary articles, the right of *Personal Security*, and the right of *Personal Liberty*.

I. The right of Personal Security consists in a person's legal and uninterrupted enjoyment of his life and limbs, of his body, of his health, and of his reputation.

1. [Life is the immediate gift of God, a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb (*e*): indeed an infant *en ventre sa mère* is supposed to be already born for many purposes (*f*). And if a woman is quick with child, and by a potion or otherwise designedly killeth it in her womb; or if any one beat her, with a like design, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter (*g*).] But by the modern law, the offence is, in neither case, considered in this light; though to procure

(*e*) The rule of the civil law is the same. (Ff. 1, 5, 26.)

(*f*) For example, such infant may take an estate as legatee, or by descent, or under the limitations of a deed, and it may also have assigned to it a guardian. (See Pearce *v.* Carrington, Law Rep., 8 Ch. App. 969; Occleston *v.* Fullalove, ib., 9 Ch App. 147.) In case of *descent*, however, the presumptive heir may enter and receive the profits for his own use till the birth of the child. (See Bl. Com. vol. 1, p. 130; Co. Litt. 390 a; 12 Car. 2, c. 24, s. 8; 10 Will. 3, c. 22; Beale *v.* Beale, 1 P. Wms. 245; Doe *v.* Clark, 2 H. Bl. 399; Wallis *v.* Hodson, 2 Atk. 117; Doe *v.* Lancashire, 5 T. R. 49; Goodtitle *v.* Newman, 3 Wils. 526.)

(*g*) Bracton, l. 3, c. 4.

a miscarriage is, in all cases, a heinous crime: and if means be used, with intent to kill a child in the womb, and the child is *born alive*, and afterwards dies by reason of the means so used, the case amounts to murder (*h*).

A man's limbs—by which we here intend those members which may be useful to him in fight, the destruction of which only amounts to *mayhem* by the common law,—are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these, therefore, as to life itself, he may be said to have a natural inherent right, which draws after it certain legal consequences to which we shall now advert.

[A man's life and limbs are held of such high value by our law that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. Indeed, whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or to do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance (*i*). And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the course of these Commentaries. (*k*). The constraint a man is under in these circumstances, is called in law *duress* (from the Latin *durities*), of which there are two sorts; duress of imprisonment, where a man actually loses his liberty; and duress *per minas*, where the hardship is only threatened and impending. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason; that is, (as Bracton expresses it,) "*non suspicio*

(*h*) 3 Inst. 50.
(*i*) 2 Inst. 483.
(*k*) Vide post, bk. vi.

[*cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum*" (*l*). A fear of battery or being beaten, though well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb (*m*).

The law not only regards life and protects every man in the enjoyment of it, but also furnishes him with everything necessary for its support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the statutes enacted for the relief of the poor, of which in their proper place (*n*).]

These rights of life and member can only be determined by the death of the person; which is either a civil or a natural death (*o*). Civil death occurs where a man is outlawed or attainted; for he loses thereupon (subject to some exceptions) his civil rights and capacities; and becomes, as it were, dead in law (*p*). It also took place, formerly, where any man, by the process of the common law, took sanctuary and abjured the realm (*q*); or entered into religion, that is, went into a monastery, and became there a monk professed: in both of which cases he was absolutely dead in law, and his next heir had his estate. [For such banished man was entirely cut off from society; and such a monk, upon his profession,

(*l*) Bract. l. 2, c. 5; Co. Litt. 162 a, 253 b; see R. *v.* Southerton, 6 East, 144.

(*m*) 2 Inst. 483. Blackstone (vol. i. p. 131) remarks that the doctrine of the civil law with regard to *duress* agrees with our own, and cites Ff. 48, 21, 1.

(*n*) As to the laws relating to the poor, vide post, bk. IV. pt. III. c. II.

(*o*) Co. Litt. 132 a.

(*p*) 3 Inst. 213; 4 Bl. Com. 380. As to the doctrine of *attainder*, vide post, bk. VI.

(*q*) Co. Litt. 133 a; Newsome *v.* Bowyer, 3 P. Wms. 37, n. (B).

[renounced solemnly all secular concerns; and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. A monk was therefore accounted *civiliter mortuus*: and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased (*r*). Nay, so far was this principle carried, that in a case where one became bound in a bond to an abbot and his successors; and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof: here it was held that the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due (*s*). In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion; for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life (*t*).] But, even in the times of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts (*u*); and therefore, after the Reformation, it was held that civil death could no longer take place by profession (*x*), nor (by the effect of

(*r*) Litt. s. 200.

(*s*) Co. Litt. 133 b.

(*t*) Archbishop of Canterbury's case, 2 Rep. 48 b; Co. Litt. 132 a.

(*u*) Co. Litt. 132 b.

(*x*) Rex *v.* Lady Portington, 1 Salk. 162; and see In re Metcalfe, 33 L. J., Ch. 308.

21 Jac. I. c. 28, s. 7, abolishing sanctuaries) by abjuration (*y*).

This natural life being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority. Yet, nevertheless, it may be lawfully taken away (as before observed) in the necessary defence of life or limb (*z*); and is also capable of being forfeited for a breach of those laws of society which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience and legality of which, we may hereafter more conveniently inquire in a subsequent part of these Commentaries (*a*). At present it may suffice to observe, that it results from the very nature of the social compact, on which we have supposed all municipal law to be founded (*b*), that no privation or restraint ought in any case to be inflicted on the individual, unless it be indispensable to the protection of some public interest of adequate importance. All laws therefore savour of injustice and oppression, which authorize the destruction of life in order to secure a public object of comparatively trivial character; or even an object of the highest consequence to the public, but capable of being sufficiently secured by some more lenient method. We shall find accordingly, that, though the law of England in some cases affects the life of the delinquent, it is only for the prevention of crimes of the deepest dye—the severity by which our penal system was once unhappily distinguished having been progressively, and now at length effectually, softened by the milder spirit of modern legislation. To this it may be proper to add, that our form of government, or constitution, is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. ["*Nullus liber homo*," says the great

(*y*) 1 Hale, P. C. 605.
(*z*) Vide sup. p. 140.
(*a*) Vide post, bk. vi.
(*b*) Vide sup. p. 28.

[charter, "*aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terræ*" (*c*). Which words, "*aliquo modo destruatur*," include, according to Sir Edward Coke (*d*), a prohibition not only of *killing* and *maiming*, but also of *torturing* (to which our laws are strangers), and of every oppression by colour of an illegal authority. And it was also enacted by a statute of 5 Edw. III. c. 9, that no man should be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Edw. III. c. 3, that no man should be put to death without being brought to answer by due process of law.]

2. A man is also entitled, as to his whole body, to security from all corporal insults or injuries, whether by menaces, assaults, beating, wounding, or otherwise, though they may amount not to destruction of life or member.

3. To the preservation of his health from such practices as may prejudice or annoy it; and

4. To the security of his reputation or good name from slander.

But these three last articles, it will suffice to have barely mentioned among personal rights. It is to their infringement, rather than to the rights themselves, that the provisions of the laws have been in general directed; and a more convenient place for their further discussion, will consequently be found in that part of the work which relates to *wrongs* (*e*).

II. [Next to personal security, the law of England regards, asserts, and preserves the right of personal liberty. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observa-

(*c*) C. 29.
(*d*) 2 Inst. 48.
(*e*) As to *Wrongs*, vide post, bk. v. and bk. vi.

[tions as upon the preceding article; that it is a right strictly natural; that the laws of England never abridge it without cogent reason; and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the Great Charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land (*f*). And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law (*g*). Again, by the Petition of Right, (3 Car. I.,) no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. So, also, by 16 Car. I. c. 10, it was enacted, that if any person should be restrained of his liberty by order or decree of an illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he should upon demand of his counsel, have a writ of *habeas corpus* to bring his body before the court of King's Bench or Common Pleas; who should determine whether the cause of his commitment were just, and thereupon do as to justice should appertain.] And by 31 Car. II. c. 2, commonly called the *Habeas Corpus Act*, amended and made more effectual by 56 Geo. III. c. 100, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. Moreover, lest the *habeas corpus* should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. & M. sess. 2, c. 2, that excessive bail ought not to be required; though on the other hand, to prevent such abuses as are naturally apt to occur in the

(*f*) C. 29.

(*g*) 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

a writ of this description, it is a rule with courts that they will not grant a *habeas corpus* as of course, and without probable cause shown (*h*).

[Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, as in France was once daily practised by the crown, there would soon be an end of all other rights and immunities (*i*). Indeed, some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient; for it is the parliament only (or legislative power) that, whenever it sees proper, by suspending the *Habeas Corpus Act* for a short and limited time, can enable the crown to imprison suspected persons, without the possibility of their obtaining their discharge, during that period, by any interference of the courts (*k*); as the senate of Rome was wont

(*h*) Hobhouse's case, 3 Barn. & Ald. 420. And see 56 Geo. 3, c. 100, by the express provisions of which there must, in the cases to which it applies, be "an affidavit showing a probable and reasonable ground" for the complaint. For further information respecting the statutes of *habeas corpus*, vide post, vol. III. bk. v. c. XII.

(*i*) See 1 Bl. Com. p. 135.

(*k*) The Habeas Corpus Act was suspended by 57 Geo. 3, cc. 3, 55; and again (so far as regards Ire-

[to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, "ne quid respublica detrimenti capiat,*" was called the *senatus consultum ultimæ necessitatis:* and in like manner this experiment ought only to be tried in cases of extreme emergency: in these, the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment (*l*). And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment,*—which has been already explained to mean a compulsion by an *illegal* restraint of liberty,—until he seals a bond or the like, he may allege this duress, and avoid the extorted bond; but if a man be lawfully imprisoned, and, either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it (*m*). To make a commitment to prison lawful, it must either be by process from the courts, or by warrant from some person having authority to commit; which warrant must be in writing, under the hand and seal of him by whom it is given, and must express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus.* If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect (saith Sir Edward Coke), like Festus the Roman

land, in reference to the Fenian conspiracy there) by 29 & 30 Vict. c. 1. And see the Peace Preservation (Ireland) Act, 1881 (44 Vict. c. 6), and the Prevention of Crime (Ireland) Act, 1882 (45 & 46 Vict. c. 25).

(*l*) 2 Inst. 589.

(*m*) Ib. 482.

[governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him (*n*).

A natural and regular consequence of this right of personal liberty, is, that every Englishman may claim to abide in his own country so long as he pleases, and not to be driven from it unless by the sentences of the law. The king indeed, by his royal prerogative, may issue his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence: for this may be necessary for the public service and safeguard of the commonwealth (*o*). But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will; no, not even a criminal.] For exile was never sanctioned by the common law, except in the case of abjuration above referred to (*p*); and though in modern times persons have been conveyed to parts beyond the seas, under sentence of "transportation" (*q*), they have been so dealt with either by their own choice to escape a capital punishment, or else by the express direction of some act of parliament (*r*). [To this purpose the Great Charter declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land (*s*). And by the *Habeas Corpus* Act, 31 Car. II. c. 2, (that second *Magna Charta*, and stable bulwark of our

(*n*) 2 Inst. 52, 53. See 1 Chitty, Crim. Law, 110 et seq.

(*o*) F. N. B. 85. The writ of *ne exeat regno* is now only used as a means of preventing a defendant from leaving England. See Lees *v.* Patterson, Law Rep., 7 Ch. D. 866.

(*p*) Co. Litt. 133 a. Vide sup. p. 141.

(*q*) Convicts are still sometimes conveyed to parts beyond the seas, under that sentence of *penal servitude* which is now substituted for that of transportation. (See 20 & 21 Vict. c. 3; 22 Vict. c. 25.)

(*r*) It is said that exile was first introduced as a punishment by the legislature in the thirty-ninth year of Eliz., when a statute enacted that "such rogues as were dangerous to the inferior people should be banished the realm" (39 Eliz. c. 4; see Bar. Ant. Stat. 269); and that the first statute in which the word "transportation" is used is the 18 & 19 Car. 2, c. 3, which gave a power to the judges at their discretion either to execute, or transport to America for life, the Moss-troopers of Cumberland and Northumberland.

(*s*) C. 29.

[liberties,) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas—where they cannot have the full benefit and protection of the common law—but that all such imprisonment shall be illegal: that the person who shall dare to commit another, contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and be incapable of receiving the king's pardon:] and that the party injured shall also have his private action against the person committing, and all his aiders, advisers and abettors, whereby he shall recover his costs and also damages to the extent of at least five hundred pounds (*t*).

[The law, as above explained, is so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception.] Thus (says Coke) the sovereign cannot even constitute a man lord lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than honourable exile (*u*).

What has been hitherto said on the subject of personal liberty, refers, it will be observed, chiefly to its illegal restraint by the authority of government. When imprisonment is illegally inflicted by a private subject, relief may, in the same manner, be had by *habeas corpus:* and redress may also be obtained by action, or the offender may be punished upon indictment. But the consideration of these methods, and the further discussion of the mode of proceeding upon *habeas corpus*, more properly belong to our divisions of civil injuries and of crimes. They are

(*t*) As to the writ of *habeas corpus*, see further, bk. v. c. XII.

(*u*) See 2 Inst. 46.

glanced at, in this place, only in illustration of the importance attached by the law to the right now under consideration.

In connection with the rights of personal liberty and security, is the right of the subject to carry such arms as are proper for his defence. This is declared by the statute 1 W. & M. sess. 2, c. 2; and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression. There is an antient enactment, however, against going armed under such circumstances as may tend to terrify the people, or indicate an intention of disturbing the public peace (*x*). And, by a modern statute, the training of persons, without lawful authority, to the use of arms is prohibited; while any justice of the peace is authorized to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present (*y*

2 Edw. 3, c. 3; see Hawk. Pleas of the Crown, bk. 1, c. 63, ss. 9, 10.

(*y*) 60 Geo. 3 & 1 Geo. 4, c. 1. It may be remarked, that the volunteer rifle and artillery forces, being trained under lawful authority, viz. under the provisions of the Volunteer Acts, 1863 and 1869 (26 & 27 Vict. c. 65, and 32 & 33 Vict. c. 81), are not affected by the enactments mentioned in the text, any more than the militia, yeomanry or regular troops of the line. And see the Army Annual Act, 1882 (45 & 46 Vict. c. 7), and the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48).

BOOK II.

OF RIGHTS OF PROPERTY.

AS TO PROPERTY IN GENERAL.

THE rights of property consist in a man's free use, enjoyment, and disposal, according to the laws of the community, of all his acquisitions in the external things around him. It may be desirable to premise a few observations on the nature and origin of these rights, before we proceed to distribute and consider their several objects.

[The rights in question, though we speak of them in the plural, in regard to the different objects over which a man may have ownership, and the different modifications of that ownership, are yet capable of being reduced, and for the purpose of abstract discussion are usually reduced, to one general head—the right of property, or the principle by which one man claims and exercises a sole and despotic dominion over the external things of the world, in total exclusion of all other individuals. However generally recognized that right may be, there are very few that will give themselves the trouble to consider its origin and foundation. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built (*a*). We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or

(*a*) Bl. Com. vol. ii. p. 2.

[by the last will and testament of the dying owner: not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them shall enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, as we are informed by holy writ, the all-bountiful Creator gave to man "dominion "over all the earth; and over the fish of the sea, and over "the fowl of the air, and over every living thing that "moveth upon the earth" (*b*). Hence the earth, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And while the earth continued with few inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock, to his own use, such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many

(*b*) Genesis, i. 28.

[American nations when first discovered by the Europeans; and from the antient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, in which "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset*" (*c*). Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer; or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted (*d*). Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it—for rest, for shade, or the like—acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: though the instant that he quitted the use or occupation of it, another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is, for the time, his own (*e*).

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to indi-

(*c*) Justin, l. 43, c. 1.

(*d*) Barbeyr. Puff. l. 4, c. 4.

(*e*) "*Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occuparit.*"—De Fin. l. 3, c. 20.

of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world have been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious and agreeable; as habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially, for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and homestall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and adapted to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil; partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use till improved and melio-

by the bodily labour of the occupant;

labour, bestowed upon any subject which before lay in common to all men, is universally allowed to strengthen, very materially, the title that mere occupancy gives to an exclusive property therein.

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the Book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, "because he had digged that well" (*f*). And Isaac, about ninety years afterwards, reclaimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace (*g*).

All this time the soil and pasture of the earth remained still in common as before, and open to every occupant; except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more

(*f*) Genesis, xxi. 30. (*g*) Ib. xxvi. 15, 18, &c.

[readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which, Tacitus informs us, continued among the Germans till the decline of the Roman Empire (*h*). We have also a striking example of the same kind in the history of Abraham and his nephew Lot (*i*). When their joint substance became so great that pasture and other conveniences grew scarce, the natural consequence was, that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: "Let there be no strife, I pray thee, between "thee and me. Is not the whole land before thee? Sepa- "rate thyself, I pray thee, from me. If thou wilt take "the left hand, then I will go to the right; or if thou "depart to the right hand, then I will go to the left." This plainly implies an acknowledged right in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, "and beheld all the plain of Jordan, that it was well "watered everywhere, even as the garden of the Lord. "Then Lot chose him all the plain of Jordan, and jour- "neyed east; and Abraham dwelt in the land of Canaan."

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants, which was practised as well by the Phœnicians

(*h*) "*Colunt discreti et diversi; ut fons, ut campus, ut nemus, placuit.*"—De Mor. Ger. 16.

(*i*) Genesis, c. xiii.

[and Greeks, as by the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not, therefore, a separate property in lands as well as moveables been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human

[species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property; and in order to ensure that property recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, governments, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.]

Upon the question therefore how property came to be established, or what it is that gave man an exclusive right to retain in a permanent manner that specific land, or moveable, which before belonged generally to everybody, but particularly to nobody,—it seems on the whole that property had its original foundation in *occupancy*, but that it was confirmed and strengthened by such labour as was bestowed upon the subject-matter,—as where land once discovered and taken possession of was improved by agriculture, or where vegetable or mineral productions once found were rendered more valuable by manufacturing processes. [There is, indeed, some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Locke, and others holding that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy alone, being a degree of bodily labour, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement. However, both sides agree in this, that occupancy is

[the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground, or such moveables, as he found most agreeable to his own convenience, provided he found them unoccupied by any one else (*j*).

Property, both in lands and moveables, being thus originally acquired by the first taker — which taking amounts to a declaration that he intends to appropriate the thing to his own use—it remains in him by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one be possessed of a jewel, and cast it into the sea or on to a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hide it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he lose or drop it by accident, it cannot be collected from thence that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder.

In this manner, then, both lands and moveables became everywhere permanently appropriated. However, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the

(*j*) In Maine's Treatise on Antient Law (p. 254), the theory, that the origin of property is the assent of mankind to the occupation by individuals, is contrasted with the doctrine of Savigny, that property was acquired by adverse possession gradually ripened by prescription.

[time he holds possession of them, and no longer. Such among others are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; and such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which (subject to certain restrictions) any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, though without his voluntary abandonment, it naturally follows that they return to the common stock, and any man else has in general an equal right to seize and enjoy them afterwards.

The doctrine of ownership once established, soon drew after it that of transfer. It was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance; which may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the previous owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property: and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent ex-

[pressed by the conveyance, gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

If all property ceased upon death, it would follow by the principles before established, that the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of them, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion (*k*). And further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of *escheats* has been adopted in almost every country; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed (*l*).]

As to the right, however, of the children or nearest relations of the deceased to inherit, (which was allowed much earlier than that of devising by testament,) its origin is, perhaps, to be traced to a higher source than the mere institutions of civil society. There is a general and intui-

(*k*) Thus, to prevent any vacancy of possession, the civil law considered father and son as one person; so that, upon the death of either, the inheritance did not so properly descend, as continue in the hands of the survivor. (See Ff. 28, 2, 11.)

(*l*) As to escheats, vide post, pt. I. c. XII.

tive feeling that it has nature on its side; and there seems in truth good reason to refer it to the same natural title of occupancy, on which the right of property itself is founded. [No doubt its merits, as a civil institution, are such as might be sufficient in themselves to have recommended it for the adoption of a wise legislature; for the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society; it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They become therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore, also, in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs, being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that since God had given him no seed, his steward Eliezer, one born in his house, was his heir (*m*).

While property continued only for life, testaments were useless and unknown: and when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will; till at length it was found that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigencies of their families required. This introduced pretty gene-

(*m*) Gen. xv. 3.

[rally the right of disposing of one's property, or a part of it, by *testament;* that is, by written or oral instructions properly witnessed and authenticated, according to the pleasure of the deceased, which we therefore emphatically style his *will.* This was established in some countries much later than in others.] With us in England, as the law stood in the reign of Henry the second, the testamentary power of a man over his moveable possessions was limited, for he could then only dispose of one-third of them to the exclusion of his wife and children; but this restriction soon fell out of use. As to *lands*, these, before the Conquest, were fully devisable; but afterwards, and until the reign of Henry the eighth, the general law (subject to special customs in particular places) was that they could only be devised for a term of years, and only a certain portion of them even to that limited extent: and it was not till after the Restoration, that the power of devising real property became so universal as at present (*n*).

Wills and testaments are obviously in their nature of date posterior to the formation of civil society, and must be considered as the mere creatures of the municipal law; by which also it is clear that the particular modifications of the law of inheritance and succession are alone regulated. [Accordingly we find that every distinct country has different ceremonies and requisites to make a testament completely valid: neither does anything vary more than the right of inheritance under different national establishments. In England, particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state. In general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inherit-

(*n*) This arose in consequence of the conversion of tenure in chivalry into tenure in socage, by the st. 12 Car. 2, c. 24; vide post, bk. II. pt. I. c. II. and c. XX.

[ance: in real estates, males are preferred to females, and the eldest male will usually exclude the rest: in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.]

Such is the origin that we are disposed to assign to property itself, and to the power of transferring or transmitting property, considered in the abstract. However, it is clear that all proprietary rights, as we now find them established in any country, rest on the municipal law as their *immediate* basis—being indeed some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty; and, like those relative to life and limb, they have always been guarded by the laws of England with peculiar vigilance, and have been frequently recognized in distinct and emphatic terms by the legislature. [Thus the Great Charter has declared, that no freeman shall be disseised or divested of his freehold, or of his liberties, or free customs, save by the judgment of his peers, or by the law of the land (*o*). And by a variety of antient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands against the Great Charter and the law of the land; and that no man shall be disinherited, nor put out of his franchise or freehold, unless he be duly brought to answer and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed and holden for none (*p*).]

Even for the general good of the whole community, no unnecessary violation of the rights of property is, in any instance, allowed by our law. If a new road, for example, is to be made through the grounds of a private person, in a case where it would be extensively beneficial to the public, the legislature never permits itself to do this without the consent of the owner of the land, or at least with-

(*o*) C. 29.

(*p*) See 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

out securing to him a complete indemnification. In vain may it be urged that the good of the individual ought to yield to that of the community. The true principle applicable to all such cases is one to which we have had occasion already to refer, and which is constantly borne in view by the English law, viz. that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance (*q*). The public, therefore, is considered in all such transactions as an individual treating with an individual, for an exchange. All that the legislature does is to oblige the owner to alienate his possession for a reasonable price; and even this is an exertion of power which it indulges with caution, and which nothing but the legislature can perform (*r*).

Nor is this the only instance in which the law of the land has postponed the public interest to the sacred and inviolable rights of private property. Thus no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of the government, but such as are imposed by his own consent or that of his representatives in parliament. For by the statute 25 Edw. I. c. 1, it is provided, that the king shall not take any tallage or aid but by the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land (*s*); and again by 14 Edw. III. st. 2, the prelates, earls, barons, and commons, citizens, burgesses, and merchants, shall not be charged to make

(*q*) Vide sup. p. 145.

(*r*) See 8 & 9 Vict. c. 18 (called "The Lands Clauses Consolidation Act, 1845"), for consolidating into one Act the provisions usual in Acts authorizing the taking of lands for undertakings of a public nature. The above statute was amended by 23 & 24 Vict. c. 106.

(*s*) See however the introduction to the Great Charter (edit. Oxon.), sub anno 1297; wherein it is shown that this statute, (called *De tallagio non concedendo*,) supposed to have been made in 34 Edw. 1, is in reality nothing more than a sort of translation into Latin of the *Confirmatio cartarum*, 25 Edw. 1, which was originally published in the Norman language.

any aid, if it be not by the common assent of the great men and commons in parliament. [And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsory loans, and benevolences extorted without a real and voluntary consent, it was made an article in the Petition of Right, 3 Car. I., that no man shall be compelled to yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 Will. & Mary, sess. 2, c. 2, it is declared, that levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, or for longer time or in other manner than the same is or shall be so granted, is illegal.]

PART I.

OF THINGS REAL.

THE subjects of dominion or property, in the law of England, are *things*, as contradistinguished from *persons*; and things are distributed into two kinds, things *real*, and things *personal*. Things real, (otherwise called realty,) consist of things substantial and immoveable, and of the rights and profits annexed to or issuing out of these.

Things personal, (otherwise called personalty,) consist of goods, money, and all other moveables, and of such rights and profits as relate to moveables (*a*).

The First Part of the present Book will consequently relate to things Real, and the Second to things Personal.

(*a*) Blackstone says, "*things real* "are such as are permanent, fixed "and immoveable, which cannot "be carried out of their place, as "lands or tenements—*things per-* "*sonal* are goods, money, and all "other moveables which may at- "tend the owner's person wherever "he thinks proper to go." (2 Bl. Com. p. 16.) It has been thought expedient to deviate from these definitions, which, among other objections to them, appear to be too limited, as referring to things of a substantial or solid kind only, without embracing incorporeal rights. His definition of things personal, however, does not appear to be fairly open to the objection that has been sometimes made to it, of not being extensive enough to comprise *chattels real*. For it is more correct and convenient to keep the idea of the subjects in which property may be acquired, separate from the idea of the estate or interest that may be acquired in these subjects. A chattel real is, properly speaking, not a thing personal, but rather a particular kind of estate in a thing real. It is, however, for many purposes, properly designated as *personal estate*. This is a matter that we shall have occasion to notice more fully hereafter.

CHAPTER I.

OF THE DIVISIONS OF THINGS

THINGS real are usually said to consist in lands, tenements, or hereditaments. [Land, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes and heath (*a*). It legally includeth also all castles, houses, and other buildings: for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as for so many cubical yards; or by superficial measure, as for twenty acres of water; or by general description, as for a pond, a water-course, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water* (*b*). And so if I grant a certain *water*, though the right of fishing passes, yet the soil does not (*c*). For water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property

(*a*) Co. Litt. 4 a; and see Ewer *v.* Hayden, Cro. Eliz. 476; Cooke Yates 4 Bing. 90.

(*b*) Challoner *v.* Thomas, Brownl. 142.

(*c*) Co. Litt. 4 b.

[therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it (*d*). But the land which that water covers, is permanent, fixed and immoveable: and therefore in this I may have a certain substantial property, of which the law will take notice, and not of the other. Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs in general to the owner of the surface. So that the word "land" includes not only the face of the earth, but everything under it or over it (*e*). And therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them (*f*); but the capital distinction is this, that by the name of a messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass (*g*).]

The word *tenement* is of still greater extent, and though

(*d*) See Race *v.* Ward, 4 Ell. & Bl. 702.

(*e*) Shep. Touch. 90; Raine *v.* Alderson, 1 Arnold, 329.

(*f*) Blackstone here adds, "except in the instance of *water*." But it would seem that the case of water cannot properly be considered as an exception, because "water" is *not* the particular name, in contemplation of law, of the thing intended to be passed; vide sup. p. 168.

(*g*) Co. Litt. 4 a—6 b. This word *land* is used in a still larger sense in certain statutes; as in 3 & 4 Will. 4, c. 106 (for regulating the law of inheritance), where it is provided, that, so far as the enactments of that statute are concerned, "land" shall comprise every interest, real or personal, capable of being inherited, and also money to be laid out in the purchase of land, &c.; see also c. 105, the Act for the regulation of the law of dower.

in its ordinary acceptation it is only applied to houses and other buildings, yet in its original proper and legal sense, it signifies everything that may be *holden*, that is, be the subject of *tenure*, of which we shall speak at large in the following chapter. In ordinary legal intendment, it includes not only *land* (which is the primary subject of tenure), but rents, commons and several other rights and interests issuing out of or concerning land (*h*).

But an *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression (*i*); for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal or mixed. Thus an heir-loom, or implement of furniture, which by custom descends to the heir together with the house or land, is neither land nor tenement, but a mere moveable: yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also a hereditament (*k*).

It is under the larger term of hereditaments, though it be not strictly confined to things real, that the subjects of real property have been usually arranged; and to this method it will therefore be most convenient to adhere. Hereditaments, then, are of two kinds, *corporeal* and *incorporeal*. Corporeal consist of such as affect the senses, such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation. If we apply the word hereditaments to the realty only (which is its most ordinary use), "corporeal" hereditaments are in fact the same with *land*, of which

(*h*) Co. Litt. 6 a, 20 a, 78 a; and see R. *v.* Dersingham, 7 T. R. 671; Vin. Ab. Grants (T).

(*i*) Co. Litt. 6 a. As to the term *hereditaments*, see also Moore *v.* Denn, 2 Bos. & Pul. 251; Pocock *v.* Bishop of London, 3 Brod. & Bing. 33.

(*k*) Winchester's case, 3 Rep. 2 b.

enough has been said; "incorporeal" are the rights and profits annexed to or issuing out of land. It is to corporeal hereditaments, that our attention must be first directed; and whatever is said generally, hereafter, as to the law of real property, is to be understood as referring to its corporeal subjects only, until those of the incorporeal kind present themselves, in their turn, for separate consideration, in a distinct chapter (*l*).

(*l*) As to incorporeal hereditaments, vide post, bk. II. pt. I. c. XXIII.

CHAPTER II.

OF TENURES.

In proceeding to treat of corporeal hereditaments, we shall consider, in the first place, the tenures by which they may be holden; secondly, the estates which may be had in them (*a*); and, lastly, the title to them, or the manner in which those estates may be acquired and lost (*b*). And, first, as to tenures.

These it will be impossible to understand with any degree of accuracy, unless we have some previous acquaintance with the nature of feuds, or the feudal law (*c*); a system established during the middle ages throughout the greater part of the European continent, and from thence derived to England, where its spirit still lives in several of her institutions. This chapter will therefore be dedicated, in the first instance, to an inquiry into the feudal system; after which we shall revert to our own municipal law, and particularly that branch of it which relates to the *Tenure* of real property, a doctrine that we shall find to be altogether founded upon feudal principles.

Feuds were introduced under the new dynasties founded by the barbarous tribes, who, during the fourth, fifth and sixth centuries, poured themselves from Germany and the neighbouring countries into the Roman empire (*d*). In

(*a*) Vide post, bk. II. pt. I. cc. III. —IX.

(*b*) Ibid. cc. X—XXII.

(*c*) "I do marvel many times," says Spelman, "that my lord Coke, "adorning our law with so many "flowers of antiquity and foreign "learning, hath not turned into "this field, from whence so many "roots of our law have, of old, "been taken and transplanted."—Spel. Orig. of Terms, c. VIII.

(*d*) See Spelman on Feuds, and Wright on Tenures; Co. Litt. by

every province which they subjugated, large tracts of territory were divided by lot among the conquerors, some portion falling to the king or general of the invading tribe, and the rest to his soldiers, who received their shares as free and independent property, subject only to the condition of bearing arms, as occasion might require, in the defence of the community from hostile aggression. Of the lands assigned to the sovereign of the tribe, certain portions were afterwards usually distributed by him among his adherents, and chiefly among his courtiers or companions (*comites*): but the interest they derived under these grants was not strictly in the nature of property; it was of a beneficial or usufructuary kind only, a mere stipendiary return for services (commonly services of a military description) which they were expected to render to their master, and subject at some future period to resumption; the *proprietas*, or actual ownership of the land, being considered as still residing in the sovereign himself.

This species of interest, which we find at first described as a *beneficc* (*e*), was called, about the close of the tenth century (and, as there is reason to suppose, much earlier) a *feud* (*f*),—a term which signified in the German language a stipendiary estate, and stood in contradistinction to *allodium* (*g*), the phrase applied to that independent

Harg. 64, a, n. (1), 191, a, n. by Butler.

(*e*) The portions of land thus distributed were at first revocable at the will of the lord, and were then, it is said, called *munera*. They were afterwards held for some limited time (usually one year), and called *beneficia*. In process of time they began to be granted in perpetuity, and were then called *feuda* according to Spelman, who cites Cujacius, Feud. lib. 3, p. 180. (See Spelman on Feuds, 4, 6, 9; Cowell's Interpreter, *in verb.*)

(*f*) *Feudum* is said to be compounded of *od*, possession or estate, and *feo*, wages, pay.—Robertson's Hist. Ch. V. vol. i. n. (8), citing Wachteri, Gloss. Germ. voc. *Feodum*.

(*g*) *Allodium* is stated by Robertson (ubi sup.) to be compounded of the German particle *an* and *lot*, and to signify land obtained by lot; and he cites the same glossary, voc. *Allodium*. Another derivation, however, is given by Blackstone, who considers it as compounded of *all* (*totum*), and *odh* (*proprietas*) in the Northern languages.—2 Bl. Com. p. 45, n.

species of property, before described, which had originally become vested by allotment in the conquerors of the country. There began thus to arise two distinct modes of holding or possessing land. The stipendiary held *of* (that is, in relation to and in dependence upon) a superior; the allodialist held of no one, but enjoyed his land as free and independent property; the first of these methods applying exclusively to royal domains granted out in the manner we have described, the other to such land as had been allotted to the troops on the original conquest, or to land never appropriated by the barbarians, but left in the possession of the antient owners; for the holding of this was of the same independent character, and received the same appellation of *allodium*.

The interest of the stipendiary or beneficiary tenant did not originally extend beyond his own life, if it was not even determinable at the royal pleasure; but in course of time it gradually improved in stability, and acquired an *hereditary* character, which led by a natural progress to the practice of *subinfeudation;* for the stipendiary, (or feudatory, as he should now rather be termed,) considering himself as substantially the owner, began to imitate the example of his sovereign, by carving out portions of the benefice or feud, to be held of himself by some other person, on terms and conditions similar to those of the original grant; and a continued chain of successive dependencies was thus established, connecting each stipendiary, or *vassal* as he was termed (*h*), with his immediate superior or *lord*.

The beneficiary or feudal relation was well suited to those times of violence and insecurity, and was found by experience to be attended with great advantage both to the lord and the vassal: to the former, as it secured to him a band of military retainers, attached by duty and by

(*h*) From *gwas*, a Celtic word for a servant.—Hallam's Middle Ages, p. 155, 7th ed.

sentiment to his person; and to the latter, as it brought them into close connection with a powerful superior, under whom they found that shelter from oppression, which the law was then too weak to afford. The effect of this, as regarded the allodial species of property, was remarkable: the allodialist, though enjoying a nominal independence, found himself exposed to all the evils and dangers attendant on a state of civil confusion, and began to contemplate with envy the comparative security of the feudal vassal: he was therefore gradually induced to place himself under the same relation by changing the nature of his property from allodial to feudal; in order to effect which he gave up or surrendered his land to some powerful lord, and received it back again from him in the shape of a beneficium or feud, to be held upon some kind of service; or, instead of resorting to this formal transaction, he would in other cases merely *acknowledge* himself to hold as a vassal to some chosen lord, under specified services, as if by the effect of a former grant, which had, in truth, never taken place. In one or other of these methods, allodial lands were gradually changed into feudal, in every part of the continent where the feudal system had been introduced; and this conversion became, in some countries, almost universal; though, in others, there were many estates which always continued to be held allodially (*i*).

Such, according to the best informed and most discriminating writers on the subject, is the true history of the origin and establishment of the feudal system (*k*); by which we may perceive that it was not, according to the theory adopted by Blackstone, an invention of government applied systematically by the barbarous tribes to the management of the conquered countries, with a view to security from foreign invasion or domestic insurrection (*l*),

(*i*) See Co. Litt. by Harg. 65 a, n. (1).

(*k*) See particularly Robertson's Charles V. vol. i. n. (8); and Hallam's Middle Ages, vol. i. p. 142—323, 7th edit.

(*l*) 2 Bl. Com. pp. 45, 46.

but rather a conventional arrangement of property, established by gradual usage among the new dynasties, and brought into general acceptance by its tendency to aggrandize powerful lords, and to protect persons of inferior rank from the inconveniences of civil disorder. It seems probable, however, that the principle of the *beneficium*, or of that contract by which the temporary use of land was bestowed on the one hand, as the stipend for military service to be performed on the other, had been known to the barbarians in their native countries, and before their invasion of the Roman provinces; and some authority for the supposition seems to be supplied by the passage which Blackstone cites from Florus, relative to the demand which the Cimbri and Teutones are recorded to have made of the Roman people, about a century before the Christian era:—"*Ut martius populus aliquid sibi terræ daret, quasi stipendium; cæterum, ut vellet, manibus atque armis suis uteretur*" (*m*).

[The feud was conferred by words of gratuitous and pure donation, *dedi et concessi*, which would still be the operative words in a modern infeudation or deed of feoffment in the English law. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals; which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known, and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the

(*m*) 2 Bl. Com. p. 46. Some writers have supposed that the idea of feudalism was borrowed by the barbarous tribes from the Roman tenure of Emphyteusis. (See Maine on Antient Law, p. 302.)

[vassal or tenant, upon investiture, usually did *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and there professing that "he did become his *man*, from that day forth, of life and limb and earthly honour;" and then he received a kiss from his lord (*n*). Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo* (*o*).]

Besides the fealty and homage, the relation of lord and vassal was ordinarily attended with the following feudal incidents (*p*):—1. *Aid*, which was originally a mere benevolence voluntarily granted by the vassal to his lord in time of difficulty and distress (*q*); but in process of time came to be considered as a matter of right. 2. *Relief*, which was a tribute paid to the lord, for "*taking up*" the estate which had lapsed or fallen in by the death of the last tenant: for while the feuds were not properly hereditary, but granted by favour of the lord only to the children of the former possessor, the heir used generally to pay a fine or acknowledgment to the lord, in horses, arms, money or the like, for the renewal of the feud; and this was called a relief, because, in the words of the feudal writers, "*incertam et caducam hereditatem* relevat." And this relief afterwards, when the feuds became absolutely hereditary, continued to be paid on the death of the tenant, though the original reason of it had ceased to apply. 3. *Fine on alienation*, being a sum of money paid to the

(*n*) Litt. s. 85.

(*o*) It was an observation of Dr. Arbuthnot that tradition is nowhere preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope, vi. 134, 8vo.) It will not, perhaps, be thought puerile to remark in confirmation of this observation, that in an antient game described by Julius Pollux (*Onomastic.*, l. 9, c. 7), under the title of *basilinda*, or *the king I am*, the ceremonies and language of feudal homage are preserved with great exactness.

(*p*) Hallam's Middle Ages, vol. i. p. 181, 7th ed.

(*q*) See Bract. lib. ii. tr. 1, c. 16, s. 8.

lord by the tenant whenever he had occasion to make over his land to another. [This depended on the nature of the feudal connection; for, the reason of conferring the feud *being the personal abilities of the feudatory to serve in war, it was not fit he should, without the lord's consent,* be at liberty to transfer this gift, either from himself, or from his posterity who were presumed to inherit his valour, to others who might prove less able. And as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service, therefore the lord could no more transfer his seigniory or protection, without the *attornment*, that is to say, the consent of his vassal, than the vassal could transfer his feud without the consent of his lord (*r*); it being equally unreasonable that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.] 4. *Escheat* and *forfeiture*, being two different modes by which the relation between the lord and vassal might be dissolved (*s*). The first was where the tenant in possession of a feud not granted for life only, but transmissible by hereditary descent, died without leaving any heir behind him upon whom, according to the terms of the original grant, the feud could any longer descend; in which case it reverted to the lord, that is, the gift being determined, resulted back to the giver. The second case (that of forfeiture) occurred where the tenant committed some act in violation of his duty towards his lord, such as rendered him unfit to be longer trusted as a vassal; and the effect of this was that his interest in the feud became forfeited, and returned to the lord, as for a breach of that condition of fidelity on which the grant was made (*t*).

[Feuds, as we have seen, did not originally extend

(*r*) Wright's Tenures, 30.

(*s*) As to *escheat*, vide post, bk. II. pt. I. c. XII.: as to *forfeiture*, ib. c. XIV.

(*t*) Wright, ubi sup. 44.

[beyond the life of the first vassal; but in process of time they were universally extended to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions; and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*u*). But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place: and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud but such as was of the blood of, that is, lineally descended from, the first feudatory"(*x*). And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud.] But this was found upon many accounts inconvenient, particularly by dividing the services, and thereby weakening the strength of the feudal union; and, moreover, *honorary* feuds, or titles of nobility, had been gradually introduced, which were not of a divisible nature, but could only be inherited by the eldest son (*y*); and, at length, in imitation of these last, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest (*z*).

[These were the principal and very simple qualities of the genuine or original feuds, which were all of a military

(*u*) Wright's Tenures, 17.
(*x*) Ibid. 183.
(*y*) Feud. ii. 55.
(*z*) Wright, ubi sup. 32.

[nature, and in the hands of military persons; though the feudatories being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants, obliging them to such returns, or *reditus*—that is to say, rents—in service, corn, cattle, or money, as might enable the chief feudatories to attend to their military duties without distraction. And by these means the feudal polity was greatly extended, these inferior feudatories (who held what are called in the Scots law "rerefiefs") being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords (*a*). But this at the same time demolished the antient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession, which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken, and under that of improper or derivative feuds were comprised all such as do not fall within the other description; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a money rent, in lieu of military service; such as were in themselves alienable, without mutual licence; and such as might descend indifferently either to males or females. But where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine and proper feud (*b*).

(*a*) Wright's Tenures, 20.

(*b*) Ibid. 36.

[The feudal polity of which we have here presented an outline seems not to have been received in this part of our island, at least not universally, and as a part of the national constitution, till the reign of William the Norman (*c*). Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons,—who were a swarm from what Sir William Temple calls the same northern hive,—something similar to this was in use, yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans: for the Saxons were firmly settled in this island at least as early as the year 600;] and it was not until the eleventh or twelfth century that feuds arrived to their full vigour and maturity, even on the continent of Europe (*d*).

[This introduction, however, of the feudal tenures into England by King William, does not seem to have been effected immediately after the Conquest, nor by the mere arbitrary will and power of the Conqueror; but to have been gradually established by the Norman barons and others, in such forfeited lands as they received from the gift of the Conqueror; and afterwards universally consented to by the great council of the nation, long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that the Conqueror was able to reward his Norman followers with very large and extensive possessions; and their regard for the feudal law, under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were

(*c*) Spelm. Gloss. 218; Bract. l. 2, c. 16, s. 7.

(*d*) Hallam's Middle Ages, vol. i. p. 192, 7th ed. Blackstone fixes A.D. 800, as the period of the full maturity of the feudal system, and he cites Craig, l. 1, t. 4.

[probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it; for we learn from the Saxon Chronicle (*e*), that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting themselves in a posture of defence; for, as soon as the danger was over, the king held a great council to inquire into the state of the nation (*f*); the immediate consequence of which was the compiling of the great survey called Domesday Book, which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum, where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person (*g*). This may possibly have been the era of formally introducing the feudal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant, and couched in these remarkable words—"*Statuimus, ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum*

(*e*) A.D. 1085.

(*f*) "*Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hâc terrâ; quo modo incoleretur, et a quibus hominibus.*"—Chron. Sax. ib.

(*g*) "*Omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.*"—Chron. Sax. A.D. 1086.

[*regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere*" (*h*). The terms of this law, as Sir Martin Wright has observed, are plainly feudal (*i*); for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies, foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection, which exacts the performance of the military feudal services as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet; et sint semper prompti et bene parati ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti*" (*k*).

It is probable that, by thus consenting to the introduction of feudal tenures, our English ancestors meant no more than to put the kingdom in a state of defence by establishing a military system, and to oblige themselves, in respect of their lands, to maintain the king's title and territories with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the Duchy of Normandy, but also such fruits and dependencies, such hard-

(*h*) Wilkins's Leg. Anglo-Sax. LL. Guil. Con. c. 52.

(*i*) Tenures, 66.

(*k*) Wilkins's Leg. ubi sup. c. 28.

[ships and services, as were never known to other nations; as if the English had, in fact as well as in theory, owed everything they had to the bounty of their sovereign lord (*l*).

Our ancestors, therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown as the basis of a military discipline, with reason looked upon these deductions as grievous impositions and arbitrary conclusions from principles that, as to them, had no foundation in truth (*m*). However, the Conqueror, and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines; but their successor, Henry the first, found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of King Edward the Confessor, or antient Saxon system; and accordingly, in the first year of his reign, granted a charter, whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it (*n*). But this charter was gradually broken through, and the former grievances were revived and aggravated by himself and succeeding princes; till, in the reign of King John, they became so intolerable, that they occasioned his barons or principal feudatories to rise up in arms against him; and thus at length produced the famous great charter at Running-mead, which, with some alterations, was confirmed by his son Henry the third (*o*).] And, though the immunities granted by King John (especially as his charter was finally altered, in its last edition,

(*l*) See Spelm. of Feuds, c. 28.

(*m*) Wright's Tenures, 81.

(*n*) Wilkins's Leges Anglo-Sax. LL. Hen. 1, c. 1.

(*o*) The charter granted by King John received confirmation, with some not inconsiderable variations, in the first, second and ninth years of Henry's reign. The last of these (the Magna Charta, consisting of thirty-seven chapters, printed under 25 Edward 1, in our present Statute Book,) has never received any alterations. But Sir E. Coke reckons thirty-two instances wherein it has been solemnly ratified (Hallam's Mid. Ages, vol. ii. p. 452 7th ed.)

by Henry the third,) are very greatly short of those granted by Henry the first, they were justly esteemed at the time a vast acquisition of English liberty. And although, by reason of the alteration of tenures,—which principally took place, as we shall presently see, in the reign of Charles the second,—many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted; this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. [And from hence also arises another inference; that the liberties of Englishmen are not mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness, but a restoration of that antient constitution of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived of by the force of the Norman arms.]

The general introduction of strict feudal principles into this country, as above explained, gave rise to that fundamental maxim of the law of England which still prevails, that all land belonging to any subject is *holden* of some sùperior, and either mediately or immediately of the sovereign (*p*); for in this realm, according to Sir E. Coke, we have not *allodium*, the name by which the feudists abroad distinguished such estates of the subject as were not holden of any superior (*q*). And as all lands in England are holden, they are consequently called *tenements*, the possessors thereof *tenants*, and the manner of their possession a *tenure* (*r*). Where the tenure was of the sovereign immediately, it was said to be *in capite*, or in chief. And this was of two kinds, either *ut de honore* (where the land was held of the king as the proprietor of some honour, castle, or manor), or *ut de coronâ* (where it was held of him in right of the

(*p*) Co. Litt. by Harg. 93 a, 1 a, 1 b, 65 a.

(*q*) Ib. 64 a, n. (1); et vide sup. p. 174.

(*r*) Co. Litt. ubi sup. 1 b; 2 Bl. C. 59.

crown itself); and it is to the latter kind that the term of tenure *in capite* was more especially applied (*s*). But the holding might also be mediate, that is, in the way of subinfeudation (*t*). [For such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king: and, thus partaking of a middle nature, were called *mesne* or middle lords. So that if the king granted a manor to A., and A. granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord *paramount;* A. was both tenant and lord, or was a mesne lord; and B. was called tenant *paravail*, or the lowest tenant (*u*).

This distinction of mediate or immediate tenancy ran through all the different sorts of tenure, which we shall here proceed severally to consider.

There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: and the grand criteria of these were the natures of the several services or renders that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base;* in respect of their quantity and the time of exacting them, they were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier, or a freeman, to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons

(*s*) It seems that when tenure *in capite* was mentioned generally, it was understood to apply to a tenure *ut de coronâ* and not *ut de honore*. (Co. Litt. 108 a; 2 Inst. 64; Mag. Char. c. 31; 1 Edw. 3, st. 2, c. 13; 1 Edw. 6, c. 4; F. N. B. 175; Bro. Alien. 11; Wright's Ten. 163.) See however the remarks which are made on this subject in Co. Litt. by Harg. 108 a, n. (3).

(*t*) Vide sup. p. 174.

(*u*) 2 Inst. 296.

[of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is base, or villein service.]

The various combinations of these services gave rise to the various kinds of lay tenure. Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account of any author antient or modern; and of this, the following is an outline or abstract. "Tenements are of two kinds, frank-tenement "and villenage. And of frank-tenements some are held "freely, in consideration of homage and *knight-service;* "others in *free-socage* with the service of fealty only, or "with fealty and homage, according to some authori-"ties" (*x*). And, again, "Of villenages some are pure, "others privileged. *Pure villenage* is where a man holds "upon terms of doing whatsoever is commanded of him, "nor knows in the evening what is to be done in the "morning, and is always bound to an uncertain service. "There is also another kind of villenage holden of the "king, from the time of the Conquest, which is called "*villein-socage*, and which is villenage, but of a privileged "sort. Such tenants of the king's demesnes have the "privilege that they cannot be removed from the land "while they do the service due; and these villein-socmen "are properly called *glebæ ascriptitii.* They perform "villein services, but such as are certain and deter-"mined" (*y*). This account, illustrated as it is by other authorities, proves that there antiently existed (as before

(*x*) Bract. l. 4, c. 28, § 1. (*y*) Ibid. § 5.

remarked) four principal kinds of lay tenure: and that they were as follows—*servitium militare*, that is knight-service, or in law-French, *chivalry* or *service de chivaler*, answering to the *fief d'haubert* of the Normans,—where the service was free, but uncertain (*z*): *liberum socagium* (free socage), where it was not only free, but certain: *purum villenagium* (pure villenage), where it was base in its nature, and uncertain: and lastly, *villenagium privilegiatum* (or villein socage), where it was base but certain; and this last seems principally to have prevailed among those who are above described as "tenants of the king's demesnes."

The four kinds of tenure above enumerated, however, in process of time were described as only three, viz. knight-service, free socage, and *copyhold;* which last comprises both the species of villenage to which Bracton refers. These three subsisted in England till the middle of the seventeenth century, and the two last subsist to this day. We will proceed to examine a little into the character of each of them.

First, as to *knight-service*, otherwise called tenure by chivalry. [This was the most universal, and esteemed the most honourable species of tenure, and it differed in very few points from a pure and proper feud, being entirely military in its character. To make this holding, it was necessary that the tenement in point of quantity should amount to twelve ploughlands (*a*); which was called a knight's fee, *feodum militare* (*b*); and the value of which is stated in 1 Edw. II. at £20 per annum (*c*). And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the

(*z*) Spelm. Gloss. 219. Tenure by "knight service," is expressly called "*fief d'haubert*" in the Mirrour (c. 2, § 27).

(*a*) 2 Inst. 596. A ploughland, *carucata terræ*, was as much as one plough could plough in a year. (Co. Litt. 69 a.)

(*b*) Inst. ubi sup.

(*c*) Ibid.; Co. Litt. ubi sup.

[wars for forty days in every year, if called upon (*d*); which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion (*e*). And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure had all the marks of a strict and regular feud: it was granted by words of a pure donation, *dedi et concessi* (*f*); was transferred by investiture or delivering corporal possession of the land, usually called "livery of seisin;" and was perfected by homage and fealty (*g*).] It also drew after it the following consequences, some of which, as we have seen, were ordinary feudal incidents, and therefore in general observance, not in England only, but throughout a large portion of the continent (*h*).

1. In tenure by chivalry (or knight-service) the land on the death of the tenant passed by *descent* to his heir, for the practice of granting feuds *jure hæreditario* has been in use amongst us ever since the Norman Conquest (*i*); and

(*d*) Mr. Selden contends that a knight's fee did not consist of land of a fixed extent or value, but was as much as the king was pleased to grant, upon the condition of having the service of one knight. (Tit. of Hon. p. 2, c. 5, ss. 17 and 26.)

(*e*) Litt. § 95.

(*f*) Co. Litt. 9.

(*g*) As to homage and fealty, vide sup. p. 177; Co. Litt. 64 a, 67 b. Foreign jurists frequently blend homage and fealty together, but in England they were distinct. Co. Litt. by Harg. 68 a, n. (1).

(*h*) Vide sup. p. 183. The local extent of the feudal law is pointed out in Hallam's Mid. Ages, vol. i. pp. 200—203 (7th edit.), where its regular machinery and systematic establishment are considered as chiefly applying "to the dominions of Charlemagne and to "those countries which afterwards "derived it from thence." Denmark, Sweden, Bohemia and Hungary are particularly mentioned as countries not influenced by the feudal system.

(*i*) Hist. Eng. Law, by Reeves, vol. i. p. 36.

in this descent sons succeeded before daughters, and an elder son before a younger (*k*).

2. If the heir in chivalry was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry (*l*). This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and fourteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, Sir E. Coke remarks, that at the age of fourteen she might govern an household, and marry a husband, who could do knight's service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, the lord might not only keep her in ward till she attained that age, but if she remained unmarried, he might keep her land in his custody two years longer by virtue of the statute of Westm. I., 3 Edw. I., c. 22 (*m*).

[This wardship, so far as it related to land, though it was not, nor could be, part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person to supply the infant's services, till he should be of age to perform them himself:

(*k*) Hale's Hist. C. L. c. 11.

(*l*) *Wardship* and *marriage* were not ordinary feudal incidents, but nearly peculiar to England and Normandy. (Hallam, Mid. Ages, vol. ii. pp. 429, 215; vol. i. p. 190, 7th edit.)

(*m*) Litt. s. 103; 2 Inst. 204; Blackstone states the guardianship of females to have lasted till sixteen. But see Coleridge's Blackstone, vol. ii. p. 67.

[and, if we consider the feud in its original import, as a stipend, fee or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended: though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry the first, before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also in a political view, the lord was most concerned to give his tenant suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain;* that is, the delivery of their lands out of their guardian's hands (*n*). For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *Magna Charta* (*o*). However, in consideration of their lands having been so long in ward, they were excused all the reliefs; and the king's tenants all the primer seisins, also to be hereafter mentioned (*p*). In order to ascertain the profits that arose to the crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county, commonly called an *inquisitio post mortem* (*q*); which was instituted to inquire (at the death of any man of fortune)

(*n*) Co. Litt. 77 a.
(*o*) 25 Edw. 1, c. 3.
(*p*) Litt. ubi sup.
(*q*) Hoveden, sub Rich. 1.

[the value of his estate, the tenure by which it was holden, and who, and of what age, his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry the seventh, that by colour of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto (*r*). And afterwards a court of wards and liveries was erected, for conducting the same inquiries in a more solemn and legal manner (*s*).

When the heir thus came of full age he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine (*t*). For, in these heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom, in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony is supposed to have been the original of the feudal knighthood (*u*). This prerogative of compelling the vassals to be knighted, or to pay a fine—as expressly recognized in parliament by the statute *de Militibus*—was exerted as an expedient for raising money by many of our best princes, particularly

(*r*) 4 Inst. 198.

(*s*) St. 32 Hen. 8, c. 46; 33 Hen. 8, c. 22.

(*t*) Blackstone adds here (vol. 2, p. 69), "provided he held a knight's fee *in capite* under the crown;" but Mr. Christian observes, that Lord Coke does not make that distinction in his Commentary on the Stat. de Milit. (2 Inst. 593), and that the power of the Commissioners, in the commissions issued by Edward the sixth and Queen Elizabeth, was not limited to the king's tenants. And see 16 Car. 1, c. 20.

(*u*) "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto framcâque juvenem ornant. Hæc apud illos toga, hic primus juventæ honos: ante hoc domus pars videntur; mox reipublicæ.*"—De Mor. Germ. c. 13.

[by Edward the sixth and Queen Elizabeth (*v*); and yet it was the occasion of heavy murmurs when exerted by Charles the first: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch and the legal exertion of prerogative. However, among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this flower of the crown, and it was accordingly abolished by statute 16 Car. I. c. 20.]

3. But there still remained a species of authority which the guardian was at liberty to exercise over an infant ward; viz. the right of *marriage*, which signifies the power of disposing of the ward in matrimony (*x*). For he might tender to his infant tenant, when of the age of fourteen, a suitable match without *disparagement*, or inequality; and this the infant, if a male, could not refuse and marry elsewhere, without forfeiting *double* the value which the lord might have obtained for the alliance, *duplicem valorem maritagii*; nor could a female ward refuse, without entitling her guardian to hold her lands by way of penalty, till she attained the age of twenty-one. And even without tender of a match, the lord was entitled in every case, on the ward's coming of age, to the single value which he might have obtained for his or her marriage (*y*). [This seems to have been one of the greatest hardships of our antient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female wards intermarrying with the lord's enemy (*z*): but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim

Statute (*incerti temporis*) 1 Edw. 2, st. 1 (Ruff.).

(*x*) See Co. Litt. 88, n. (11), by Harg.; Hist. of Eng. Law, by Reeves, vol. i. p. 116.

(*y*) Lord Darcy's case, 6 Rep. 70 b; Palmer's case, 5 Rep. 126 b; Co. Litt. 82 a.

(*z*) Bract. l. 2, c. 37, s. 6.

[*of strictly feudal origin; the most probable account of it* seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards; a custom which was introduced into England, together with the rest of the Norman doctrine of feuds (*a*). And it is likely that the lords usually took money for such their consent, since, in the before-cited charter of Henry the first, the king engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this among other beneficial parts of that charter being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract (*b*); or, as it was expressed in the first draft of that charter, "*ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate suâ*" (*c*). But these provisions in behalf of the relations were omitted in the charter of Henry the third: wherein the clause stands merely thus—"*hæredes maritentur absque disparagatione*" (*d*): meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lords claiming the marriage of heirs male (*e*); and as Glanvil expressly confines it to heirs female (*f*). But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive fœmina*, as Bracton more than once expresses it (*g*): and also, as nothing but disparagement was restrained by *Magna Charta*, they thought themselves at liberty to make all other advantages that they could (*h*).

(*a*) Gr. Cust. 95.
(*b*) Cap. 6, edit. Oxon.
(*c*) Ib. 3.
Ib. 6.
The words *maritare* and *mariseem ex vi termini* to denote the providing of a *husband*.
(*f*) L. 7, c. 9 and 12, and l. 9, c. 4.
(*g*) L. 2, c. 38, s. 1.
(*h*) Wright's Tenures, 97.

[And afterwards this right of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton (*i*); which is the first direct mention of it perhaps to be met with, in our own or any other law.

4. The tenant in chivalry was also liable to *aids*. These in England were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity; insomuch that the neglect of doing it, whenever it was in the vassal's power, was, by the strict rigour of the feudal law, an absolute forfeiture of his estate (*k*). Secondly, to make the lord's eldest son a knight: a matter that was formerly attended with great ceremony, pomp and expense. This aid could not be demanded till the lord's heir was fifteen years old, or capable of bearing arms (*l*); the intention of it being to breed up the eldest son and heir apparent of the seigniory to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion; for daughters' portions were in those days extremely slender, few lords being able to save much out of their income for this purpose: nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this, or any other incumbrances. From bearing their proportion to these aids, no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants (*m*). And one cannot but observe, in this particular, the great resemblance which the lord and vassal of the feudal law, bore to the patron and client of the Roman republic (*n*); between whom also there sub-

(*i*) 20 Hen. 3, c. 6.
(*k*) Feud. l. 2, t. 24.
(*l*) 2 Inst. 233.
(*m*) Philip's Life of Pole, l. 223.
(*n*) See Maine's Antient Law, p. 313.

[sisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there were three which were usually raised by the client; viz. to marry the patron's daughter; to pay his debts; and to redeem his person from captivity (*o*).

But in addition to these antient feudal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts (probably in imitation of the Romans), and aids to enable him to pay aids or reliefs to his superior lord; though, from these last, the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior.] To prevent this abuse, King John's *Magna Charta* ordained, that no aids be taken by the king of his tenants *in capite* without consent of parliament, nor in any wise by inferior lords, save only the three antient ones above mentioned (*p*). But this provision was omitted in Henry the third's charter, and the same oppressions were continued till the twenty-fifth year of Edward the first, when the statute called *Confirmatio Chartarum* was enacted; which in this respect revived King John's charter, by ordaining that none but the antient aids should be taken. These ordinances, however, related to the species of aids only; the quantity of each aid was provided for by other statutes. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable (*q*); as well as that the aids taken by the king of his tenants *in capite* should be settled by parliament (*r*). But aids were never completely adjusted till the statute Westm. I. (3 Edw. I. c. 36), and 25 Edw. III. stat. 5, c. 11, the former of which fixed the aid of a mesne (or inferior) lord, for making his eldest son a knight, or

(*o*) "*Erat autem hæc inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in æris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos rent.*"—Paul. Manutius de Senatu Romano, c. 1.

(*p*) Cap. 12, 15.

(*q*) Ib. 15.

(*r*) Ib. 14.

marrying his eldest daughter, at twenty shillings, that is to say, the supposed twentieth part of the annual value of every knight's fee: and the latter statute did the same with regard to the king's tenants *in capite*. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was on that account never ascertained.

5. [The tenant in chivalry was liable besides to *relief*. This was looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, it was merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir (*s*). The English ill brooked this consequence of their new-adopted policy; and therefore William the Conqueror by his laws *ascertained* the relief, by directing, in imitation of the Danish heriots, that a certain quantity of arms and habiliments of war should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100*s*. (*t*). William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws; thereby in effect obliging every heir to purchase anew or *redeem* his land (*u*): but his brother, Henry the first, by the charter before mentioned, restored his father's law: and ordained that the relief to be paid should be according to the law so established, and not an arbitrary redemption (*x*). But afterwards, when, by an ordinance in the twenty-seventh year of Henry the second, called the "assize of arms," it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms, according to the laws of the

(*s*) Wright's Tenures, 99.

(*t*) Wilkins's Leges Anglo-Sax. LL. Guil. Con. cc. 22, 23, 24.

(*u*) 2 Roll. Abr. 514.

(*x*) "*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*" — Text. Roffens. cap. 34.

[Conqueror; the composition was universally accepted of 100*s.* for every knight's fee, as we find it ever after established (*y*). But it must be remembered, that this relief was only payable if the heir at the death of his ancestor had attained his full age of one and twenty years (*z*).

6. The tenant in chivalry was also liable to the payment of *primer seisin*, which was, however, a burthen only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords (*a*). It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir, (provided he were of full age,) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life (*b*). This seems to be little more than an additional relief, but grounded upon this feudal reason; that, by the antient law of feuds, immediately upon the death of a vassal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders till the heir appeared to claim it and received investiture, during which interval the lord was entitled to take the profits; and unless the heir claimed within a year and a day, it was by the strict law a forfeiture (*c*). This practice, however, seems, in England, not to have long obtained, if ever, with regard to tenure under inferior lords; but as to tenure *in capite*, the *prima seisina* was expressly declared, under Henry the third and Edward the second, to belong to the king by prerogative, in contradistinction to other lords (*d*). The king was entitled to enter and receive the whole

As to what was a "knight's fee," vide sup. p. 188.

(*z*) Glanv. l. 9, c. 4; Litt. § 112.

(*a*) *Primer seisin* seems not to have been an ordinary feudal incident, though in France the lord might enter on the lands and possess them for a year if the heir could not pay the relief.—Hallam, Mid. Ages, vol. i. p. 183 (7th edit.).

(*b*) Co. Litt. 77 a.

(*c*) Feud. l. 2, t. 24.

(*d*) Stat. Marlb. (52 Hen. 3) c. 16; *Prerogativa Regis* (17 Edw. 2), c. 3.

[profits of the land, till livery was sued, which suit being commonly made within a year and a day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take, as an average, the *first fruits*, that is to say, one year's profits of the land (*e*). And this afterwards gave a handle to the popes—who claimed to be feudal lords of the Church—to claim, in like manner, from every clergyman in England the first year's profits of his benefice, by way of *primitiæ* or first fruits.]

7. The tenant in chivalry, on arriving at the full age of twenty-one, had the power of *aliening* his land by sale; but only so that it should be held of the same lord of whom he had himself held it previously (*f*); and the tenant had no power of aliening it by a testamentary disposition.

8. If the tenant in chivalry held *in capite* he was compelled on aliening his land to pay a *fine;* for if he aliened without obtaining a licence, it became a question whether the land was not absolutely forfeited (*g*). [But this severity was mitigated by the statute 1 Edward III. c. 12, which declared, that in such a case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a licence of alienation; but if such tenant presumed to aliene without a licence, a full year's value should be paid (*h*).] If, however, the tenant did not hold *in capite*, but of a mesne lord, no fine on alienation seems to have been exacted.

9. The estate of the tenant in chivalry was liable to the incidents of *escheat and forfeiture*. These were feudal

(*e*) Staundf. Prerog. 12.

(*f*) This was by the statute of *Quia emptores*, (18 Edw. 1, st. 1). This statute applied both to tenants in chivalry and those in socage: (2 Inst. 501.) Even anterior to its provisions the tenant might aliene, but only by way of sub-infeudation; that is, to hold as of himself; and in general only a part of his lands. See Wright's Tenures, p. 154; Co. Litt. by Harg. 43 a, n. (2); 2 Bl. Com. p. 161.

(*g*) 2 Inst. 66.

(*h*) Ibid. 67.

incidents attaching in full force to the tenure in chivalry, and were attended besides with a severity which seems to have been peculiar to England (*i*), namely, that by *attainder* (as it was termed) of treason or felony the tenant not only forfeited his land, but his blood was held to be corrupted or stained; whereby every inheritable quality was entirely blotted out and abolished, so that no land could thereafter be transmitted from him or through him in a course of descent

These were the principal qualities, fruits, and consequences of the tenure by knight-service: a tenure by which a great part of the lands in this kingdom was held, till the middle of the seventeenth century; and which was created, as Sir Edward Coke expressly testifies, for a military purpose (*l*): viz. for defence of the realm by the king's own principal subjects; which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight-service proper; which was to attend the king in his wars. But there were also some other species of knight-service; so called (though improperly), because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and also because they were attended with similar fruits and consequences. [Such was the tenure by *grand serjeanty*, *per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like (*m*); or to be his butler, champion, or other officer, at his coronation (*n*). This tenure was in most other respects like knight-service (*o*); only the tenant was not bound to pay aid (*p*), or escuage (*o*);

(*i*) Hallam, Mid. Ages, vol. i. p. 188, 7th ed.; 2 Bla. Com. 254.

(*k*) The subject of *attainder* is considered post, bk. VI.

(*l*) 4 Inst. 192.

(*m*) Co. Litt. by Harg. 108 a, n. (1).

(*n*) Litt. s. 153.

(*o*) Ib. s. 158.

(*p*) 2 Inst. 233.

[and, while tenant by knight-service paid five pounds for a relief on every knight's fee, "tenant by grand serjeanty" paid one year's value of his land, were it much or little (*r*). Moreover, none could hold by grand serjeanty, save of the king only. As to tenure by *cornage*,—to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects,—this, like other services of the same nature, when the tenure was immediately of the king (*s*), was a species of grand serjeanty (*t*).

These services, both of chivalry and grand serjeanty, were all personal and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; first, by sending others in their stead, and in process of time by making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* in Latin, or *servitium scuti; scutum* being then a well-known denomination for money: and in like manner it was called, in our Norman French, *escuage:* being indeed a pecuniary, instead of a military service (*u*). The first time this appears to have been taken, was in the fifth year of Henry the second, on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our antient histories, that from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these assessments, in the time of Henry the second,

(*r*) Litt. s. 154.
(*s*) Co. Litt. 107 a.
(*t*) Litt. s. 156.
(*u*) Littleton, Coke, and Bracton, render it the "service of the shield," *i. e.* of arms, being a compensation for actual service; see Co. Litt. by Harg. 68 b, 73 a, n. (2), 74 a, n. (1).

[seem to have been made arbitrarily and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and King John was obliged to consent, by his *Magna Charta*, that no scutage should be imposed without consent of parliament (*x*). But this clause was omitted in his son Henry the third's charter (*y*): where we only find that scutages or escuage should be taken as they were used to be taken in the time of Henry the second: that is, in a reasonable and moderate manner. Yet afterwards, by statute 25 Edward I., and many subsequent statutes (*z*), it was again provided that the king should take no aids or tasks but by the common assent of the realm; hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament (*a*), such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

By the degenerating of knight-service, or personal military duty, into escuage or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained: instead of forming a national militia, composed of barons, knights and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of tenures now tending to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burdens, which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, in addition to the scutages to which they were liable in defect of personal attendance—which however were as-

(*x*) "*Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.*"—Cap. 12.

(*y*) Cap. 37.

(*z*) Vide sup. p. 196.

(*a*) Old Ten. tit. Escuage.

[sessed by themselves in parliament—they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted, or his eldest daughter married, not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin;* and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains (*b*), "when he came to his own after he was out of *wardship*, "his woods decayed, houses fallen down, stock wasted and "gone, lands let forth and ploughed to be barren," to reduce him still further, he was yet to pay half a year's profits as a fine for suing out *livery;* and also the price or value of his *marriage;* or twice that value if he refused such wife as his lord and guardian tendered him without disparagement, and married elsewhere. Add to this, the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid; and when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence* of *alienation*.

A slavery so complicated, and so extensive as this, called aloud for remedy, in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances, till at length the humanity of King James the first consented (though the plan proceeded not to effect) to abolish them all, in consideration of a proper equivalent (*c*),—in like manner as he had formed a scheme for removing the feudal grievance of heritable jurisdictions in Scotland; a change which at a later period was carried into execution by the statute 20 George II. c. 43 (*d*).

(*b*) Commonw. l. 3, c. 5.

(*c*) 4 Inst. 202.

(*d*) Dalrymp. of Feuds, 292. By another statute of the same year

[King James's plan for the abolition of our military tenures seems to have been nearly the same as that which was afterwards pursued in the reign of Charles the second; only with this difference, that by way of compensation for the loss which the crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the crown, and assured to the inferior lords, payable out of every knight's fee, within their respective seigniories: an expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. But at length the military tenures, with all their heavy appendages, (having during the Usurpation been discontinued,) were destroyed at one blow by the statute 12 Car. II. c. 24; which enacts, that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away:—that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away (*e*):—and that all sorts of tenures, held of the king or others, be turned into free and common socage, save only tenures in frankalmoign, copyholds and the honorary services (without the slavish part) of grand serjeanty. A statute, which was a greater acquisition to the civil property of this kingdom

(20 Geo. 2, c. 50), the tenure of *ward-holding* (equivalent to the knight-service of England) was abolished in Scotland.

(*e*) Mr. Hargrave holds this mention of tenures *in capite* to have been a mistake in the framers of the Act; (see Co. Litt. by Harg. 108, n. (5)). There may be some doubt, however, as to the sense in which the term is used, as there were two kinds of tenure *in capite*; vide sup. p. 185. It is at all events certain that the enactment was not intended to prohibit persons from holding immediately under the crown. Indeed, it is in this manner that land in fee is now most usually held.

[than even *Magna Charta* itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches.

Secondly, as to *Free Socage*, otherwise called Freehold. This is the second kind of tenure which we proposed to consider (*f*), and into which, by the statute just mentioned, all tenures by knight-service are now converted. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our antient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton: "if a man holds by rent in money, without any escuage or serjeanty, *id tenementum dici potest socagium*; but if you add thereto any royal service, or escuage, to any the smallest amount, *illud dici poterit feodum militare*" (*g*). So too the author of Fleta: "*ex donationibus, servitia militaria vel magnæ serjantiæ non continentibus, oritur nobis quoddam nomen generale, quod est socagium*" (*h*). Littleton also defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight-service (*i*). The service must therefore be certain, in order to denominate it socage: as to hold by fealty and 20*s*. rent; or, by homage, fealty and 20*s*. rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only, without any other service: for all these are tenures in socage (*k*).

(*f*) Vide sup. p. 188.
(*g*) L. 2, c. 16, s. 9.
(*h*) Ibid. s. 9.
(*i*) S. 117.
(*k*) Litt. ss. 117, 118, 119. As to the etymology of the term *socage*, it is derived by Littleton, Lord Coke, and others, from the French word *soc*, a ploughshare; its services being supposed to have con-

[But, as formerly shown on the authority of Bracton (*l*), socage is of two sorts: *free*-socage, where the services are not only certain but honourable; and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free socage (*m*). Of this tenure we are now to speak; and this, both in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any.] It is of a strongly feudal character indeed, being created by words of pure donation and livery of seisin, and invariably attended with the obligation of fealty at the least, (even where no other service was rendered,) and with all the incidents attaching to feuds in general. Yet it falls far short, upon the whole, of the severity of the tenure in chivalry; and this not only as being certain in sisted formerly of those of husbandry only, though changed in process of time to a pecuniary rent; (see Co. Litt. by Harg. 86 a, n.; Wright's Ten. 144.) On the other hand this term is considered by Somner and Blackstone as originating in the Saxon *soc*, which signified any franchise or privilege (though more especially one of jurisdiction); *socage* being distinguished from other tenures by the great privilege of fixed and ascertained services (see 2 Bl. Com. p. 80). The opinion of Bracton, as one of the earliest authorities on the subject, would be entitled to great weight were it more decidedly expressed. "*Dici poterit socagium a socco, et inde tenentes socmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum custodia et maritagia ad propinquiores parentes jure sanguinis pertinebant.*" —Bract. c. 35. This leans, though somewhat doubtfully, towards the derivation from the *plough;* but in another part of his work he speaks of the tenure called *socagium villanum* in a way that rather tends to assign to *socagium* the meaning of *privileged* tenure. "*Est etiam genus villenagii, &c. quod dicitur* socagium villanum, *et quod est* villenagium *sed tamen* privilegiatum." As to *socmanni*, it may be remarked that they are frequently mentioned in Domesday Book; and in Hallam's Mid. Ages (vol. ii. pp. 586, 481, 7th edit.) they are supposed to have been derived from the superior class of Anglo-Saxon *ceorls*. It is stated, however, that they were perfectly exempt from all marks of villenage, both as to persons and estates; and they are considered as "the root of "a noble plant, the free socage "tenants, or English yeomanry."

(*l*) Vide sup. p. 187.

(*m*) Glanv. l. 7, c. 3.

its services, but also as being comparatively mild in some of its fruits and consequences. This will manifestly appear by the following enumeration of them.

1. The law of inheritance is the same in socage tenure as in tenure by knight-service (*n*).

2. [Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because, in this tenure no military or other personal service being required, there was never any occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but his nearest relation, not being one to whom the inheritance could descend, was to be his guardian in socage, and to have the custody of his land and body till he arrived at the age of fourteen (*o*). At fourteen this wardship in socage ceases: and the heir may oust the guardian, and call him to account for the rents and profits; for at this age the law supposes him capable of choosing a guardian for himself (*p*). It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to choose their own guardians, might make an improvident choice. Therefore, when, by 12 Car. II. c. 24, almost all the lands in the kingdom were turned into socage tenures, the same statute enacted that it should be in the power of any father to appoint a guardian by will, till his child should attain the age of twenty-one (*q*). And

(*n*) There was antiently, however, a time when socage lands descended to *all* the sons; (Glanv. l. 7, c. 3; Hale, C. L. c. 11.)

(*o*) See Co. Litt. by Harg. 88 b, n. (6).

(*p*) Litt. s. 123; Co. Litt. 89 a.

(*q*) See Co. Litt. by Harg. 88 b, n. (15).

[if no such appointment be made, the courts will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin (*r*).

3. "Marriage," or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For if the guardian caused his ward to marry under the age of fourteen, he was bound to account for the value of the marriage, even though he took nothing for it (*s*). For the law made guardians account, not only for what they *did*, but also for what (but for their own wilful default) they *might*, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but the statute of Charles having destroyed all values of marriages, this doctrine of course ceased with them. At fourteen years of age the ward (till the Act for preventing clandestine marriages) might have disposed of himself in marriage, without any consent of his guardian (*t*).

4. The tenure in socage was subject, of common right, to aids for knighting the lord's eldest son and marrying his eldest daughter (*u*): and these were fixed by the statute of Westm. 1 (cap. 36) at 20*s.* for every 20*l.* per annum so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but they were all abolished by the same statute 12 Car. II. c. 24 (*x*).

5. Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to

(*r*) Co. Litt. by Harg. 88 b, n. (16). As to the law of guardian and ward, vide post, bk. III. c. IV.

(*s*) Litt. s. 123.

(*t*) 26 Geo. 2, c. 33. This act was repealed by 4 Geo. 4, c. 76, (one of the present Marriage Acts,) which substitutes new provisions to prevent clandestine marriages.

(*u*) Co. Litt. 91 a.

(*x*) Vide sup. p. 204.

[the lord, be the same either great or small (*y*); and therefore Bracton will not allow this to be properly a relief, but "*quædam præstatio* loco relevii *in recognitionem domini*" (*z*). And the statute 28 Edw. I. c. 1, declared that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Again reliefs in knight-service were only payable if the heir at the death of his ancestor was of full age; but in socage they are due even though the heir be under age, because the lord has no wardship over him (*a*). The statute of Charles the second reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee simple are holden by a rent (*scil.* chief rent or quit rent), relief is still due of common right upon the death of a tenant (*b*).

6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service (*c*). But primer seisins were entirely abolished by the statute of Charles the second.]

7. The tenant in socage enjoyed the same right of aliening his lands as the tenant by knight-service (*d*).

8. Fines for alienation were, apparently, due for lands held *in capite* by socage tenure, as well as in lands held by the tenure of knight-service; for the statutes that relate to this point, and Sir Edward Coke's comment on them, speak generally of all tenants *in capite*, without making any distinction (*e*); but all fines for alienation of lands held *in capite* were taken away by the statute of Charles the second.

9. Escheat and forfeiture were equally incident to tenure

(*y*) Litt. s. 126.

(*z*) L. 2, c. 37, s. 8.

(*a*) Litt. s. 127.

(*b*) Freeman *v.* Booth, 3 Lev. 145; see Co. Litt. by Harg. 93 a, n. (2).

(*c*) Co. Litt. 77 a.

(*d*) Vide sup. p. 199. But the tenant in socage might, by the custom of some particular places, also aliene by way of *testamentary disposition*. Co. Litt. by Harg. 111 b, n. (1).

(*e*) Co. Litt. 43 a; 2 Inst. 65, 66, 67.

in socage, as they were to tenure by knight-service. But by modern statutes, which we shall have occasion to notice more particularly hereafter, the antient law of escheat and forfeiture for *felony* has been swept away in respect of every description of tenure (*f*).

Such is the tenure in free socage; being that under which the bulk of real property in this realm is held at the present day; and which is now better known by its modern denomination of *freehold* (*g*). But this tenure, which we have hitherto discussed only in its proper and ordinary shape, also comprises some particular varieties, viz. *petit serjeanty*, *tenure in burgage*, and *gavelkind*.

It has been explained that grand serjeanty was a variety of the tenure in chivalry, involving honorary services to the king's person, such as carrying his sword or banner; and that these services were reserved by the statute 12 Car. II. c. 24, though the tenure, in other respects, was, by that Act, converted into free socage (*h*). [Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other (*scil.* petit serjeanty) is a rent or render, tending to some purpose relative to the king's person (*i*). And, accordingly, petit serjeanty is said by Littleton to consist in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like (*k*). The services of this tenure being free and certain, it is in all respects free socage (*l*); though being held of the king,

(*f*) See 54 Geo. 3, c. 145; 3 & 4 Will. 4, c. 106, s. 10; 13 & 14 Vict. c. 60; 33 & 34 Vict. c. 23; et vide post, bk. II. pt. I. c. XII.

(*g*) It may be worth while to remark, that the term *freehold* was formerly inadequate to express the particular kind of tenure; as it was indifferently applicable both to knight-service and to free socage, and accordingly we find from Lord Coke that it was only used to express that the holding was not base; (Co. Litt. 94 a;) but, as by the abolition of knight-service, free socage has become the only free lay tenure, freehold is now taken as equivalent to free socage.

(*h*) Vide sup. pp. 201, 204.

(*i*) Co. Litt. 107 a, 108 b.

(*k*) Litt. Ten. s. 159.

(*l*) Wright's Tenures, 160.

[it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty. And *Magna Charta* respected it in this light, when it enacted that no wardship of the lands or body should be claimed by the king, in virtue of a tenure by petit serjeanty (*m*).

Tenure in *burgage* is said by Littleton to be but tenure in socage (*n*): and it is where the king or other person is lord of an antient borough, in which the tenements are held by a rent certain (*o*). It is indeed only a kind of town socage, as common socage, by which other lands are holden, is usually of a rural nature. Many of these tenements so held in antient burgage are subject to a great variety of customs: the principal and most remarkable of which is that called *Borough-English*, so named in contradistinction (as it were) to the Norman customs, and which is taken notice of both by Glanvil (*p*), and by Littleton (*q*); viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father (*r*). For which Littleton gives this reason; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself (*s*). Other authors have indeed given a much stranger reason for this custom, as if the lord of the fee had antiently a right of concubinage with his

(*m*) Cap. 27.

(*n*) S. 162; and see Glan. lib. 7, c. 3.

(*o*) Litt. ss. 162, 163.

(*p*) Lib. 7, c. 3.

(*q*) S. 165.

(*r*) "The custom of Borough-English prevails in several cities and antient boroughs, and districts of smaller or larger extent adjoining to them, in different parts of the kingdom. The land is held in socage, but according to the custom it descends to the youngest son, in exclusion of all the other children of the person dying seised. In some places, this peculiar rule of descent is confined to the case of children, in others, the custom extends to brothers and other male collaterals." "The custom of Borough-English governs the descent of copyhold land in various manors."—(Third Real Property Report, p. 8.) And see as to Borough-English, Year-Book, 36 Hen. 6, 20; Co. Litt. by Harg. 10 a, n. (3), n. (4). See also the case of Muggleton *v.* Barnett, 2 H. & N. 653.

(*s*) S. 211; and see Year-Book, 8 Edw. IV., 18.

[tenant's wife on her wedding night, and that therefore the tenement descended not to the eldest but the youngest son; who was more certainly the offspring of the tenant (*t*). But it is not known that ever this custom prevailed in England, though it appears to have prevailed in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm the third (*u*). And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to Father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle, and go to seek a new habitation. The youngest son, therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that among many other northern nations, it was the custom for all the sons but one to migrate from the father, and the last remaining son (who would in general be the youngest) had the duty cast on him of burying his father, with the proper ceremonial obsequies, and as a recompense for the discharge of such duty, and conditionally upon discharging it, he became his heir (*x*). So possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors which Cæsar and Tacitus describe.] Other special customs there are, in different burgage tenures: as that in some the wife shall be endowed of *all* her husband's tenements, and not of the third part only, as at the common law (*y*); and that in others, a man might (as in the Saxon times) dispose of his lands and tenements

(*t*) See 3 Mod. Rep. in prof.

(*u*) Sel. Tit. of Hon. 2, 1, 47; Reg. Mag. l. 4, c. 31.

(*x*) "*Pater cunctos filios adultos a præter unum, quem hæredem sui juris relinquebat.*"—Walsing. Upodigm. Neust. c. 1; and see especially Elton's Origins Eng. Hist., pp. 184—185.

(*y*) Litt. s. 166.

by will (*z*),—a mode of disposition which, though (as already mentioned) partially permitted in the time of Henry the eighth, did not receive its full development till after the Restoration (*a*).

Gavelkind occurs as of common right in the county of Kent, almost the whole of which is (or at one time was) subject to this tenure (*b*). To account for this it should be recollected, that the Kentish men obtained concessions from the Conqueror, by the effect of which they were permitted to retain their antient liberties. [And as it is principally here that we meet with the custom of gavelkind, though it was and is to be found in some other parts of the kingdom (*c*), we may fairly conclude that this custom of descent was a part of those liberties. The distinguishing properties of this tenure are principally these: 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen (*d*). 2. The estate did not escheat in case of an attainder for felony; the maxim being "the father to the bough, the son to the plough" (*e*). 3. In most places where the tenure is gavelkind, the tenant always enjoyed the power of disposing of his lands and tenements by will (*f*). 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together (*g*); which was indeed antiently the most

(*z*) S. 167.

(*a*) Wright's Tenures, 172; vide sup. p. 163.

(*b*) As to gavelkind, see Year-Book, 36 Hen. VI., 20; Consuet. Kantiæ (17 Edw. 2, st. 1, c. 16); 32 Hen. 8, c. 29; 4 & 5 Vict. c. 35, s. 80; Co. Litt. 140 a.

(*c*) Stat. 32 Hen. 8, c. 29; Kitch. of Courts, 200; Co. Litt. 140 a. See acc. Third Real Property Report, p. 8.

(*d*) Lamb. Peramb. 614. As to a feoffment, vide post, bk. II. pt. I. c.

(*e*) Lamb. Peramb. 634. As to the doctrine of escheat as affected by modern legislation and particularly by 33 & 34 Vict. c. 23, vide post, bk. II. pt. I. c. XII.

(*f*) F. N. B. 198; Launder *v.* Brooks, Cro. Car. 561.

(*g*) Litt. s. 210. But where a gavelkind owner devises to his "right heirs," the devise enures to the benefit not of the heirs in gavelkind, but of the heir or heirs by the law general. (Garland *v.* Beverley, Law Rep., 9 Ch. D. 213; and see Scriven on Copyholds, 6th ed., by Brown, pp. 272—274.)

[usual course of descent all over England (*h*). These, among other properties, distinguish this tenure in a most remarkable manner: and yet it is said to be only a species of socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain (*i*). Accordingly, by a charter of King John, Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight-service (*k*); and by statute 31 Hen. VIII. c. 3,—an act for disgavelling the lands of divers lords and gentlemen in the county of Kent,—such lands are directed to be descendible for the future *like other lands which were never holden by service of socage.*]

Thirdly, as to *Copyhold.* This tenure sprang from the tenure of villenage, as described in its different branches by Bracton (*l*); and in order to obtain a clear idea of this subject, it will be necessary to take into consideration the origin and nature of *manors.*

[Manors are in substance as antient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day (*m*); just as we observed of feuds, that they were partly known to our ancestors, even before the Norman conquest.] It is from the Normans, however, that we derive the particular form of manors with which we are conversant at present (*n*); and, among them, a manor, *manerium* (*o*), seems to have been originally a district of ground held

Glanvil, l. 7, c. 3; Hale, C. L. c. 11; Analect. l. 2, c. 7.

(*i*) Wright's Tenures, 211.

(*k*) Spelm. Cod. Vet. Leg. 355; vide post, bk. II. pt. I. c. XVII.

(*l*) Vide sup. p. 187.

(*m*) Co. Cop. ss. 2, 10.

(*n*) Ibid. s. 10.

(*o*) Lord Coke (Cop. s. 31) suggests two derivations of this term: *a manendo*, because the owner of the manor usually resided there; and from *mesner*, in French, to guide; the tenants being under the lord's *guidance* and direction. He gives the preference to the latter etymology.

by a lord or great personage, who kept to himself such parts of it as were necessary for his own use, which were called *terræ dominicales* or *demesne* lands (being those of the *dominus manerii*), and distributed the rest to freehold tenants, to be held of him in perpetuity (*p*). Of the demesne lands, again, part was retained in the actual occupation of the lord, for the purposes of his family; other portions were held in villenage (*q*), of which we shall presently speak more at large; and there was besides these, a portion which, being uncultivated, was termed the lord's waste, and served for public roads and for common of pasture to the lord and his tenants. Manors were formerly called also baronies, as they still are called lordships; and each baron or lord was empowered to hold a domestic court, called the court baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes regarding property among the tenants. If several of these manors were held, as was frequently the case, under one great baron or lord paramount, his seigniory over them was termed an *honor* (*r*).

[The villenage to which we have referred was a species of tenure neither strictly feudal, Norman, nor Saxon, but mixed and compounded of them all (*s*). Under the Saxon

(*p*) See Co. Cop. s. 31; and see by Lord Kenyon, Glover *v.* Lane, 3 T. R. 447; and Attorney-General *v.* Parsons, 2 Tyrw. 223.

(*q*) "*Dominicum dicitur quod quis habet ad mensam suam—dicitur etiam dominicum, villenagium quod traditur villanis*," &c.—Bracton, as cited Co. Cop. s. 12. "*Est autem dominicum proprie terra ad mensam assignata, et villenagium quod traditur villanis ad excolendum.*"—Fleta, as cited, ib. And Lord Coke expresses his assent to this doctrine, that in strictness the demesne comprised the lands held in villenage, though popularly it signified only what the lord kept in his own hands, whether waste or cultivated.—Co. Cop. s. 14; and see Attorney-General *v.* Parsons, 2 Tyrw. 223.

(*r*) 2 Bl. Com. 91; see Co. Litt. by Harg. 108 a, n. (4). It is said that there are eighty honors in England; see Com. Dig. *in tit.* Honor, where they are enumerated.

(*s*) Wright's Tenures, 215. Blackstone adds that the tenure may also have "somewhat Danish in its composition" (vol. ii. p. 92).

[government, there were, as Sir William Temple mentions (*t*), a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the *folkland*, from which they were removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition (*u*). This they called villenage, and the tenants villeins, either from the word *vilis*, or else (as Sir Edward Coke tells us) *à villâ*, because they lived chiefly in villages, and were employed in rustic works of the most sordid kind (*x*); resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land; or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another (*y*). They could not leave their lord without his permission; and if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held, indeed, small portions of land, by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge

(*t*) Introd. Hist. Eng. 59.
(*u*) Wright's Tenures, 217.
(*x*) Co. Litt. 116 a.
(*y*) Litt. s. 181.

[and ditch the lord's demesnes and any other the meanest offices (*z*); and their services were not only base, but uncertain both as to their time and quantity (*a*). A villein could acquire no property, either in lands or goods; but if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity (*b*).

In many places, also, a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord (*c*), and, by the common law, the lord might also bring an action against the husband, for damages in thus purloining his property (*d*). For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* (*e*). In case of a marriage between a freeman and a neife, or a villein and a free-woman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary herein to the maxim of the civil law, *partus sequitur ventrem*. But no bastard could be born a villein, because, by another maxim of our law, he is *nullius filius;* and as he could *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it (*f*). The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord; for he might not kill or maim them, without being subject to indictment at the king's suit (*g*).

Villeins might be enfranchised by manumission, which was either express or implied: express, as where a man granted to the villein a deed of manumission (*h*); implied,

(*z*) Litt. s. 172.
(*a*) Bracton, l. 4, tr. 1, c. 28.
(*b*) Litt. s. 177.
(*c*) Co. Litt. 140 a.
(*d*) Litt. s. 202.
(*e*) Ib. s. 187.
(*f*) Ib. ss. 187, 188.
(*g*) Ib. ss. 189, 194; Co. Litt. 120 b.
(*h*) Co. Litt. 204.

[as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years (*i*); for this was dealing with his villein on the footing of a freeman: giving him an action against his lord, and vesting in him an ownership entirely inconsistent with his former state of bondage. So, also, if the lord brought an action against his villein, this enfranchised him (*k*); for as the lord might have a short remedy against him, by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at anything in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good as, in others better than, their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption in a regular course of descent, the common law, of which custom is the life, now gave them title to hold as against their lords; *scil.*, on performance of the services, to have and to hold their lands in spite of any determination of the lord's will. For, though in general they were still said to hold their estates at the will of their lord, yet it was such a will as was agreeable to the customs of the manor; which customs were and are preserved and

(*i*) Co. Litt. 204—6.

(*k*) Co. Litt. 208; and in the Roman law there were similar provisions regarding implied manumissions; see Justinian's Institutes, I. 11, 12.

[evidenced by the rolls of the several manor courts in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a copyhold (*l*).

Thus copyhold tenures (as Coke observes), although very meanly descended, yet come of an antient house (*m*); for, from what has been premised, it appears that copyholders are in truth no other but villeins (*n*); who, by a long series of immemorial encroachments on the lord, at last established a customary right to those estates which before were held absolutely at the lord's will.] By the gradual progress of manumission also (either voluntary or constructive), the *personal* condition of villenage was at length everywhere commuted into freedom. And at the period of the reformation in religion, this change had already become almost complete. [For Sir Thomas Smith testifies, that in all his time (and he was secretary to Edward the sixth) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times of popery: for, he tells us, that "the "holy fathers, monks and friars had in their confessions, "and specially in their extreme and deadly sickness, con-"vinced the laity how dangerous a practice it was for one

(*l*) F. N. B. 12.

(*m*) Co. Cop. 32.

(*n*) In confirmation of this doctrine, see F. N. B. 12 C.; Wright's Tenures, 224; 3 Reeves's Hist. Eng. Law, 158, 312. In Astle *v.* Grant, Doug. 725, a doubt is expressed by Lord Loughborough whether the opinion that copyholders sprang from villeins be well founded; but it is an opinion that rests on the highest authority, and seems too firmly settled to be shaken. See Scriven on Copyholds, 6th ed., by Brown, pp. 12—14.

["Christian man to hold another in bondage, so that tem-
"poral men by little and little, by reason of that terror in
"their consciences, were glad to manumit all their villeins.
"But the said holy fathers, with the abbots and priors,
"did not in like sort by theirs; for they also had a scruple
"in conscience to impoverish and despoil the church so
"much as to manumit such as were bound to their
"churches, or to the manors which the church had gotten,
"and so kept their villeins still" (*o*).]

Even these remnants of the antient slavery, however, did not long survive, and the last traces of it have been entirely obliterated among us for at least two centuries; the last claim of villenage which we find recorded in our courts being in the fifteenth year of king James the first (*p*). But the abolition of the personal condition did not involve that of the copyhold tenure, to which it had given birth; and (as before stated) this tenure is one of those expressly reserved by the statute of Charles the second (*q*). In most manors, therefore, we still find that species of tenants called copyholders: whose lands, though substantially their own property, are technically part and parcel of the lord's demesnes, and are entered on the rolls of the customary court of the manor, as being held *at the will of the lord* according to the custom. And a manor (when in its proper and perfect state) also still comprises, according to its antient constitution (*r*), some freehold tenants holding of the manor in perpetuity (*s*). We find, also, the court baron (already alluded to), a tribunal whereof

(*o*) Commonwealth, b. 3, c. 10.

(*p*) Pigg *v.* Caley, Noy, 27; 11 Harg. St. Tr. 342. It may deserve remark, however, that a condition closely resembling villenage existed in some localities in Scotland so recently as the year 1799. (See Memorials of his Time, by Lord Cockburn, p. 76.)

(*q*) Vide sup. p. 204.

(*r*) Vide sup. p. 215.

(*s*) Glover *v.* Lane, 3 T. R. 447 a; Melwitch's case, 4 Rep. 26 b. Yet though there should be a failure of freehold suitors to the court baron, and consequently in strictness of law an extinction of the manor, the jurisdiction of the customary court (which is for the copyhold tenants) will not be thereby affected. (Coke's Tracts, 53.)

the freeholders are the judges, and distinct from the customary court of the copyholders, though usually held at the same time and place (*t*).

No freehold, it is to be observed, can be now converted into copyhold; of which the chief and most obvious reason is, that the essence of the latter tenure is immemorial custom (*u*). But, on the other hand, a copyhold is capable of being turned into freehold, either by the lord's conveying to the copyholder the freehold of the particular premises, or by his releasing to him the seignorial rights; and such transmutation is called *enfranchisement* (*x*).

Copyhold, like the other tenures to which we have adverted, involves the obligation of fealty. A copyhold tenement is *descendible* also, where the custom of the manor so permits, to the *heir*. As for the rule of descent it is the same (in the greater number of manors) with the ordinary rule in free socage tenure: though in some it is according to the method in gavelkind, and in others again, to that in borough-English (*y*). But an incident almost peculiar to copyholds,—although it is occasionally met with in freehold or customary freehold lands,—is that of *heriots* (*z*). These, which are generally supposed to be a Danish custom (*a*), are a render of the best beast or other article (as the custom may be) to the lord, on the death of the tenant. If considered as a relic of villein tenure, there was originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them, even in the villein's lifetime; but it is now commonly considered one of the most oppressive circumstances which attend the modern law of tenures (*b*). The *wardship*

(*t*) Co. Litt. 58 a; Co. Cop. s. 31.

(*u*) See Revell *v.* Joddrell, 2 T. R. 424.

(*x*) 1 Watk. Cop. 362. It may be remarked here that if the copyholder convey to the lord, this is an *extinguishment* of the copyhold.

(*y*) Third Real Property Rep. p. 14. See Muggleton *v.* Barnett, 2 H. & N. 653.

(*z*) Third Real Property Rep. p. 16; and see 21 & 22 Vict. c. 94, s. 7.

(*a*) 2 Bl. C. 97.

(*b*) As to heriots, see further, post, bk. II. pt. I. chap. XXII.

in copyhold also resembles that in socage; for the lord is not guardian (except by special custom), but the guardianship belongs to the next of kin of the infant to whom the copyhold cannot descend; and he, like the guardian in socage, is accountable to his ward for the profits (*c*). Moreover, copyhold tenure is, in some manors subject to *relief*, of the same nature with that in socage, and used also to be liable to *forfeiture* and *escheat* (*d*): though (on the other hand) a copyholder cannot *aliene* except through the medium of a surrender to the lord: and the land passes not to the alienee till the lord admits him. *Fines*, too, are in general payable to the lord on alienation, and there are other fines upon hereditary descent (*e*). [In some manors only one of these sorts of fines can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, and sometimes fixed by custom; but, even when arbitrary, the courts, in favour of the liberty of the copyholders, have tied fines down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate (*f*). No fine therefore is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate (*g*). From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shown to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. Moreover custom was very early suffered to get the better of the express terms upon which the tenants held their lands, by declaring, that the will of the lord was to be interpreted by the custom of the manor; and, where no custom has been suffered to grow

(*c*) 2 Watk. Cop. 101; Co. Litt. by Harg. 88 b, n. (13).

(*d*) See Doe *d.* Tarrant *v.* Hellier, 3 T. R. 164, 169. But see now as to forfeiture and escheat *propter delictum tenentis*, 33 & 34 Vict. c. 23, s. 1.

(*e*) 1 Watk. Cop. 286.

(*f*) See acc. Hayward *v.* Rew, 6 H. & N. 308.

(*g*) Astle *v.* Grant, Doug. 724; Lord Verulam *v.* Howard, 7 Bing. 327.

[up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, and will not suffer the lord to extend his power so far as to disinherit the tenant.]

The tenure which we have been describing is "copyhold," commonly so called, or tenure *by copy of court roll at the will of the lord, according to the custom of the manor;* and this, as we have seen, is lineally descended from the antient tenure of *pure* villenage. In the division, however, that we formerly made of lay tenures (*h*) the term *copyhold* is to be understood in a larger sense; and as importing, according to the view sanctioned by the highest authorities, every *customary* tenure, that is, every tenure depending on the particular custom of a manor, as opposed to free socage or *freehold* (*i*); which last may now, since the abolition of knight-service, be considered as the general tenure of the country (*k*). And copyhold, in this wider application of the term, comprises, besides the principal and common kind that we have just been delineating, two varieties, viz., *antient demesne* and *customary freehold.*

The first of these seems to be the same tenure as described by Bracton, sometimes under the name of *privileged* villenage, and sometimes of *villein-socage.* This, he tells us, is such as has been held of the kings of England from the Conquest downwards; and the tenants wherein "*villana faciunt servitia, sed certa et determinata*" (*l*). [And from

(*h*) Vide sup. p. 187.

(*i*) The st. 12 Car. 2, c. 24, sanctions no other lay tenures but "*free and common socage,*" and "*copyhold*" (vide sup. p. 204). And Blackstone remarks that all lay tenures "are now in effect reduced "to two species, free tenure in "common socage, and base tenure "by copy of court roll."—2 Bl. C. 101. And see Co. Cop. ss. 17, 32; Calthorpe, 51, 54; Doe *v.* Huntington, 4 East, 288; Doe *v.* Llewellyn, 5 Tyrw. 899; 1 Gale, 193; 2 C. M. & R. 503, S. C.

(*k*) See Wright's Ten. 138, 139; Anthony Lowe's case, 9 Rep. 123. As to the term *freehold*, vide sup. p. 210, n. (*g*), et infra, p. 231, n. (*i*).

(*l*) L. 4, t. 1, c. 28, s. 5. Vide sup. p. 187.

[these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz., the tenure in *antient demesne;* to which—as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty,—he has therefore given a name compounded out of both, and calls it *villanum socagium.*

Antient demesne is a tenure existing in certain manors, which, though now perhaps granted out to private subjects, were in the hands of the crown at the time of Edward the Confessor, or William the Conqueror; and appear to have been so by the great survey in the Exchequer, called Domesday Book (*m*). The tenants in these crown manors were not all of the same order or degree. Some of them, as Britton testifies, continued for a long time pure and absolute villeins, dependent on the will of the lord (*n*): and such as have succeeded these in their tenures, now differ from common copyholders only in a few points (*o*). Others, again, were in a great measure enfranchised by the royal favour; being only bound, in respect of their lands, to perform some of the better sort of villein services of the determinate and certain class; as, to plough the king's lands for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration of these services they had many immunities and privileges granted to them (*p*); as to try the right of their property in a peculiar court of their own, called a court of antient demesne (*q*), and by a peculiar process, denominated a writ of *right close* (*r*); not to pay toll or taxes (*s*); not

(*m*) F. N. B. 14, 16; Crowther *v.* Oldfield, Salk. 364.

(*n*) C. 66.

(*o*) F. N. B. 228.

(*p*) 4 Inst. 269. It would seem that in antient demesne, the *freehold* may be in the tenant; see 2 Inst. 325; Scriven on Copyholds, 6th ed., by Brown, pp. 33, 34.

(*q*) Doe *v.* Roe, 2 Burr. 1046; Alden's case, 5 Rep. 103; and see 3 & 4 Will. 4, c. 74, ss. 4, 5, 6.

(*r*) F. N. B. 11.

(*s*) As to the extent of this immunity, see The Queen *v.* Aylesford, 2 Ell. & Ell. 538.

[to contribute to the expenses of knights of the shire; not to be put on juries; and the like (*t*).]

Manors of antient demesne accordingly comprise, to this day, both copyholders in the proper and common sense of the term, and also such privileged tenants as just described (*u*), who are alone properly called tenants in antient demesne (*x*). As to these last, though their services, like those of pure villeins, were originally base, yet (as appears by the account of them just given) they were distinguished from the latter, in that their services were fixed and determinate; and that they could not be compelled (like pure villeins) to relinquish their tenements at the lord's will, or to hold them against their own; "*et ideo*," says Bracton, "*dicuntur liberi.*" Britton also, on account of such their freedom, calls them *sokemans*, and their tenure *sokemanries;* that is to say, "lands and tenements, which are not "held by knight-service, nor by grand serjeanty, nor by "petit, but by simple services; being, as it were, lands "enfranchised by the king or his predecessors from their "antient demesne" (*y*). And the same name is also given them in Fleta (*z*). Tenants in antient demesne, like common copyholders, require admittance by the lord to perfect their title; and they hold according to the custom of the manor, though not *ad voluntatem domini* (*a*).

Customary freehold (the other variety to which we referred) exists in many parts of the kingdom. The evidences of title are to be found, as in pure or common copyhold, upon the court rolls; and here, again, the entries declare the holding to be according to the custom of the manor, though it is not said to be at the will of the lord (*b*).

(*t*) F. N. B. 14.

(*u*) F. N. B. 14, B. 11 M., 12 B.; Co. Cop. s. 32.

(*x*) Third Real Property Rep. p. 13.

(*y*) C. 66.

(*z*) L. 1, c. 8.

(*a*) 2 Bl. C. 101; and acc. Co. Cop. s. 32; but see Third Real Property Rep. ubi sup.

(*b*) Co. Cop. ubi sup.; see Third Real Property Rep. p. 20; Co. Litt. by Harg. 52 b, n. (1). There is also a kind of customary estate called *tenant right* (said to be peculiar to the north of England),

The customs of these manors are subject to great variety. But in general the incidents of customary freehold are similar to those of common copyhold (*c*).

Mention has hitherto been made of *lay* tenures only; but there is another species of tenure which still subsists, as it was reserved by the statute of Charles the second; and this is of a *spiritual* nature, and it is called the tenure *in frankalmoign*.

[Tenure in frankalmoign, (*in liberâ eleemosynâ*, or in free alms,) is that, whereby a religious corporation, aggregate or sole, holdeth lands of the donor to it and its successors for ever (*d*). The services which (prior to the Reformation) such corporations were bound to render for these lands were not certainly defined; but only, in general, to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, which is incident to all other services but this (*e*), because this divine service was of a higher and more exalted nature (*f*). This was the tenure by which almost all the antient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary

which falls under the general class of copyhold, though distinguished from the common kind by many of its incidents. (See Graham *v.* Jackson, 6 Q. B. 811; Passingham, app. Pitty, resp., 17 C. B. 313.)

(*c*) As to the state of the law with respect to the *devise* of customary freeholds prior to the year 1838, see the Third Real Property Rep. p. 22. But by 7 Will. 4 & 1 Vict. c. 26, s. 3, the power of devising was extended to all customary freehold. There has been much controversy upon the question whether the freehold, in a customary freehold, is vested in the tenant, or (as in the case of common copyhold) in the lord; (see Blackst. Law Tracts, Consid. on Cop. pp. 144 et seq.; Third Real Property Rep. p. 20); but the controversy may now be considered as finally settled, and the freehold is now deemed to be in the lord and not in the customaryhold tenant (see Scriven on Copyholds, 6th ed., by Brown, pp. 14—17). See also, as to the right of customary tenants to work minerals, The Duke of Portland *v.* Hill, Law Rep., 2 Eq. Ca. 765.

(*d*) Litt. s. 133.

(*e*) Ib. s. 131.

(*f*) Ib. s. 135.

[foundations hold them at this day (*g*); the nature of the service, however, being, upon the Reformation, altered and made conformable to the doctrines of the Church of England. Tenure in *frankalmoign* is an old Saxon tenure, and it continued under the Norman revolution, through the great respect that was shown to religion and religious men in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all secular services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions (*h*); just as the Druids, among the antient Britons, had *omnium rerum immunitatem* (*i*). And, even at present, this is a tenure of a nature very distinct from all the others we have described, being not in the least feudal, but merely spiritual. And if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden, but merely a complaint to the ordinary or visitor to correct it (*k*). In this last respect, as also in its services being not certainly defined, it materially differs from another antient holding of a spiritual nature, called *tenure by divine service:* in which the tenants were obliged

(*g*) See Third Real Property Rep. p. 7. That Blackstone is correct in stating this as the tenure of the parochial clergy, is confirmed by the language of the *assisa utrum*, the antient remedy of the parson for recovering his glebe, &c., in which the point of inquiry always was "*utrum tantum terræ sit libera eleemosyna pertinens ad ecclesiam ipsius, an laicum feodum.*"—Bract. l. 4, tr. 5, c. 1.

It is true, indeed, that in the case of a parson the inheritance is said to be in *abeyance*, and the parson entitled for his *life* only, and this at first sight appears inconsistent with the nature of frankalmoign, which always implies a gift in *perpetuity:* but the difficulty is removed by the remark of Bracton (ibid. c. 2), "*nihil clamare poterit nisi nomine ecclesiæ suæ, quia in ecclesiis parochialibus non fit donatio personæ sed ecclesiæ.*" The inheritance, according to this view, resides not in the parson himself, but in his church. (And see Litt. s. 646.) The tenure of the parochial clergy, however, will be of this kind only where the grant was originally made in the antient form, to hold *ut in liberâ eleemosynâ*. (See Wats. C. L. 373; Plowd. 242; 1 Inst. 94 b.)

(*h*) Seld. Jan. 1, 42.

(*i*) Cæsar de Bell. Gall. l. 6, c. 13.

(*k*) Litt. s. 136.

[to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor (*l*).] No donation in *frankalmoign* can now (since the statute of *Quia emptores*) be made by a subject (*m*); but the tenure is here mentioned because *frankalmoign* is excepted by name in the statute of Charles the second, and it subsists in many instances at this day.

Having made these observations with respect to the different kinds of tenure, it may be now proper to add, that, in proceeding further to investigate the nature and properties of corporeal hereditaments, we shall for the present suppose them held by the ordinary tenure of free socage, that is, *freehold;* and the reader may dismiss the subject of copyhold from his consideration, till we arrive at a later part of the treatise, when we shall have occasion to devote a separate chapter to the more particular examination of property holden by that tenure (*n*).

(*l*) Litt. s. 137.

(*m*) Ib. s. 140. By this statute (18 Edw. 1, st. 1) no subject may grant lands in perpetuity to hold of himself. From which it follows, that none can grant in frankalmoign; for (as Littleton afterwards remarks) none may hold in frankalmoign but of the grantor and his heirs, (s. 141), and the estate in frankalmoign is always in perpetuity.—Co. Litt. 94 b.

(*n*) Vide post, bk. II. pt. I. c. XXII. It may be desirable to mention here, that as regards some matters of general interest, freehold and copyhold tenures are placed by modern statutes on the same footing. These matters are *the qualification to vote at elections of members of parliament for counties;* —and *the qualification to serve on juries.* See, as to the former, 30 & 31 Vict. c. 102, s. 5; as to the latter, 6 Geo. 4, c. 50, s. 1.

CHAPTER III.

OF FREEHOLD ESTATES OF INHERITANCE.

THE second point to be considered with regard to corporeal hereditaments is the nature of the *estates* which may be had in such of them as are of free tenure, reserving for subsequent consideration the subject of corporeal hereditaments held in base tenure (*a*). An estate in land signifies such interest as the tenant hath therein; so that if a man grants all *his estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby (*b*). It is called in Latin *status*: it signifying the condition or circumstance in which the owner stands with regard to his property (*c*).

And here it is material, in the first place, to remark that some kind of actual interest or ownership is implied in the term; for a bare *possibility*, (such, for example, as the expectation of the eldest son of succeeding, upon his father's decease, to the inheritance of his lands,) will not satisfy the legal idea of an estate (*d*). Nor will a mere *power* amount to an estate; as if a man by will orders his land to be sold by his executors: for they will in such a case take

(*a*) Vide sup. p. 187, et post, bk. II. pt. I. c. XXII.

(*b*) Co. Litt. 345 a.

(*c*) 2 Bl. Com. p. 103.

(*d*) See Jones *v.* Roe, 3 T. R. 93; Doe *v.* Tomkinson, 2 Mau. & Sel. 170. There are two kinds of possibility in law:—one a *bare* possibility, such as referred to in the text; the other a possibility *coupled with an interest*—such, for example, as the possibility of *B.*, which arises on an estate being conveyed to *A.* for life, and (living *C.* at his death) then to *B.* in fee. The latter kind may without impropriety be considered as an estate (though an estate in contingency), and may now, by 8 & 9 Vict. c. 106, s. 6, be disposed of by deed.

no estate or right or title in or to the land, but only a bare authority over it (*e*); and the same may be said of a mere *revocable licence or permission* (in writing or otherwise) to make a certain use of land (*f*). On the other hand, there are various descriptions of actual interest to which the term estate applies.

The leading distinction to which estates are subject is between such as are *legal* and such as are *equitable* (*g*). But it is of legal estate alone (which is the original and primary estate) that we shall have occasion at present to speak (*h*): we purpose to consider it in a threefold view: first, regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the *number* and *connection* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either the ownership is to subsist in the tenant during his own life, or during the life of another man; or it is vested in the tenant and his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in the tenant and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

A freehold estate—*liberum tenementum*, or frank tenement, as it was formerly called,—is an estate either of in-

(*e*) Co. Litt. 265 b; Co. Litt. 113 a, n. (2).

(*f*) See R. *v.* Mellor, 2 East, 189; Wood *v.* Leadbitter, 13 Mee. & W. 838; Perry *v.* Fitzhowe, 8 Q. B. 757; Hewitt *v.* Isham, 7 Exch. 77; Roffey *v.* Henderson, 17 Q. B. 574; Taplin *v.* Florence, 10 C. B. 764.

(*g*) Sanders on Uses, 8; Bac. Us. 77; 2 Fonbl. 257. And see Alpass *v.* Watkins, 8 T. R. 516; Hardr. 469; Murley *v.* Sherren, 8 Ad. & El. 654.

(*h*) As to the distinction between legal and equitable estates, vide post, chap. IX.

heritance, or for life, in lands of free tenure (*i*); and it is material to our proper conception of it to remark, that at the common law, and prior to certain alterations in our system to be hereafter explained, an estate of this description in hereditaments corporeal could in general be created or transferred only by the ceremony called *livery of seisin*, attended with proper words of donation; which ceremony consisted, as its name imports, of a solemn delivery of possession; and was in fact the feudal investiture of which we spoke in the last chapter (*k*).

This method (which is still capable of being used) is called a *feoffment*, and the parties between whom it takes place are called the *feoffor* and the *feoffee*. By the common law, the donation with which the livery is accompanied might be merely oral; but, by the Statute of Frauds, (29 Car. II. c. 3,) some instrument in writing, under the signature of the feoffor (or of his agent by writing lawfully authorized), was made essential.

It appears by our definition, that estates of freehold may be classed as being either estates *of inheritance*, or estates *not of inheritance* (*l*); and these two kinds will each be considered in their order.

An estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where, after his death without having disposed of it, it is cast by the law upon the persons who successively represent him *in perpetuum* in right of blood, according to a certain established order of *descent*, which we shall have occasion here-

(*i*) Co. Litt. 43 b. The tenure itself, we may recollect, is expressed by the same term of *freehold;* (vide sup. p. 210, n. (*g*).) Blackstone's definition of freehold is that it is "such an estate as is conveyed by livery of seisin" (2 Bl. Com. 104); but he adds, that as estates of inheritance, or for life, and no other, are conveyed with this solemnity, therefore no others are properly freehold. It may be observed that a freehold estate may consist either in *land* or in some "tenement" (vide sup. p. 169) other than land.

(*k*) Co. Litt. 49 a. As to the manner of making livery, see Doe *v.* Taylor, 5 Barn. & Ad. 575.

(*l*) Edward Seymour's case, 10 Rep. 97 b.

after to explain (*m*). These persons are called his *heirs*, and himself their *ancestor*.

itance is otherwise c

[The true meaning of the word fee, *feodum*, is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium* (*o*); which, as we have seen, is a man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior, the ultimate property of the land resides. This allodial property no subject in England has, it being a received and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the crown. The sovereign, therefore, only hath *absolutum et directum dominium* (*p*); but all lands owned by subjects are in the nature of fiefs, whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal incidents which attended upon the first feudatories to whom the lands were originally granted.

This is the primary sense and acceptation of the word *fee*. But, as Sir Martin Wright very justly observes, the doctrine "that all lands are holden" having been for so many ages a fixed and undeniable axiom, our modern English lawyers do very rarely use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern;

(*m*) Co. Litt. 237 b. As to the law of descent, vide post, bk. II. pt. I. c. XI.

(*n*) "Fee simple" and "inheritance" are used as convertible terms, Litt. ss. 1, 9; Flet. l. 5, c. 5, s. 27.

(*o*) As to allodial property, vide sup. p. 174.

(*p*) "*Prædium domini regis est directum dominium, cujus nullus est author nisi Deus.*"—Co. Litt. 1 b.

[but generally use it to express the continuance or quantity of the estate (*q*). A *fee*, therefore, in general, signifies an estate of inheritance (*r*), being the highest and most extensive interest that a man can have in a feud, *i. e.*, in land. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man (*s*).]

Estates of inheritance are either estates in *fee simple* or estates in *fee tail* (*t*)

I. An estate in fee simple (*u*) is that which a man hath to hold to him and his heirs general, that is, his heirs both lineal and collateral, male and female (*x*); and this is often called an "estate in fee," without the addition of the word "simple" (*y*); though, as already explained, a "fee" more properly signifies any estate of inheritance. Where a man claims an estate in fee simple in possession in a corporeal hereditament (*z*), the precise technical expression is as follows: that he is "seised in his demesne as of fee" (*in dominico suo ut de feodo*); the words *in dominico*, or "in his demesne," signifying that he is seised as owner of the land itself, and not merely of the seigniory

(*q*) Wright's Tenures, 148.

(*r*) Litt. s. 1; Flet. l. 5, c. 5, s. 27.

(*s*) Co. Litt. 1 b.

(*t*) "An estate of inheritance is either fee simple or fee tail."—Edward Seymour's case, 10 Rep. 97 b. (And see Litt. s. 13; Co. Litt. 1 b, 19 a, 27 b; Vaughan, 273.) Blackstone divides inheritances into such as are *absolute* (which he considers as equivalent to fees simple) and such as are *limited*, of which he considers fees tail as forming a species. (2 Bl. Com. 104.) But the authorities in favour of the division in the text (which is the more usual one) greatly preponderate.

(*u*) As to this estate, see Co. Litt. 1 a—18 b.

(*x*) Wright's Tenures, 147; Co. Litt. 1 b. It is to be observed that we are treating at present of natural persons only. Artificial persons, or *corporations*, of whom we shall have occasion to speak hereafter, hold estates in fee simple, to them and their *successors*. (Co. Litt. 8 b.)

(*y*) Litt. s. 293.

(*z*) Where the subject is incorporeal, or where the estate is expectant on a precedent freehold, the words "*in his demesne*" are omitted. Com. Dig. Pleader (C. 35).

or services (*a*): and the words "as of fee" importing that he is seised of an estate of inheritance in fee simple; and also (in reference to the original meaning of the term *fee*) that he is not the absolute or allodial owner, but holds feudally, of a superior lord (*b*).

The quality of being always holden of a superior lord (the nature of which was fully explained in the Chapter on Tenures) is incident to every estate in fee simple belonging to a subject; but the tenure is no longer (as formerly) of the person from whose immediate grant the fee is derived, but of the person to whose seigniory it has of antient time belonged. This is by the effect of the statute of *Quia emptores* (18 Edw. I. st. 1), which was passed to put a stop to the practice of the subinfeudation of the fee simple (*c*). For according to that practice (which was antiently allowed), a new relation of lord and tenant was, upon each successive alienation of the fee, continually created between the alienor and the alienee; and the latter consequently held of the former, and not of the chief lord under whom the alienor himself held. But this being found prejudicial to the interests of

(*a*) Blackstone considers these words "in his demesne," as signifying that it is "his property, as belonging to him and his heirs for ever."—(2 Bl. Com. 105.) But this assigns no meaning to them beyond what would belong to the other words with which they are connected. Lord Coke understands the word *demesne*, when used in this particular connection, to signify *de main* or of the *hand*, because it is applied only to corporeal or tangible subjects of property. (Co. Litt. 17 a.) But the Latin term *dominicum* is opposed to this derivation; for it is evidently to be traced to *dominus*. On the other hand, there is abundant authority for holding that *dominicum* properly signifies the land which the feudal lord retained to his own use for sustentation of his household, as distinguished from what he granted out on services; and that the true sense of seisin in demesne, is that given in the text. (See Fleta, l. 5, c. 5, s. 18, s. 26; Bract. l. 4, tr. 5, c. 2, s. 2.) As for the exclusive appropriation of the term to tangible possessions, that is referable merely to the circumstance, that what the lord applied to the use of his household naturally consisted of property of that description, and not of incorporeal and intangible subjects.

(*b*) Bl. Com. ubi sup.

(*c*) As to subinfeudation, vide sup. pp. 174, 186.

the chief lords, by exposing them to the frequent loss of their escheats, wardships, and marriages, the statute in question was passed for their protection (*d*); directing that, upon all sales or feoffments of land in fee simple, the feoffee shall hold the same, not of his immediate feoffor, but of the next lord paramount, of whom such feoffor himself held; and by the same services (*e*). Since this statute, therefore, a man who would aliene an estate in fee simple, has no longer been able to convey it to be holden of himself (*f*); and his grantee will take it to hold of the same seigniory to which the fee immediately belonged when the statute passed (*g*),—unless something should have since occurred to alter the tenure. Where, from the lapse of time, no badges of tenure under any subject can now be traced, the land will be considered as holden immediately as well as ultimately of the crown (*h*), and by the service of mere fealty; which is the least and lowest service the law can create (*i*); and which being now never exacted, has become a merely nominal obligation (*k*). But in many instances a private lord can still be shown to be entitled to the immediate seigniory; the ultimate one, as formerly remarked, being in all cases vested in the sovereign.

A fee simple is the most extensive estate of inheritance that a man can possess (*l*); it is the entire property in the land (*m*): and to it is attached—as an inseparable incident

(*d*) 2 Inst. 66, 500.

(*e*) Ib. 505.

(*f*) It is said that the stat. *Quia emptores* did not extend to the king's own tenants *in capite*, but that the like law was afterwards declared as to them by the statute *De Prerogativâ Regis* (17 Edw. 2, st. 1, c. 6), and 34 Edw. 3, c. 15. (See 2 Bl. Com. 91.) It would seem, however, that the stat. *Quia emptores* did in effect apply to the tenants *in capite*, where they held *ut de honore*, and not *ut de coronâ*. (Wright's Tenures, 163; Taylor *v.* Horde, Burr. 108.) As to the distinction between these two tenures *in capite*, vide sup. p. 185.

(*g*) See Bradshaw *v.* Lawson, 4 T. R. 443.

(*h*) Booth, 135.

(*i*) Co. Litt. 98 a.

(*k*) Co. Litt. by Harg. 68 b, n. (5).

(*l*) Litt. s. 11; Co. Litt. 18 a; Vaughan, 269.

(*m*) Butler's Fearne, p. 13 (note);

—the right of *alienation*, to the full extent of the interest which is vested in the tenant himself, or for any smaller estate (*n*). If he alienes to the full extent of his interest, or, in other words, conveys away the fee simple, it follows of course that the alienee takes an estate to himself and his *own* heirs, answerable to that which the original owner had to him and *his* heirs.

[As a general rule, the fee simple or inheritance of lands and tenements is generally vested and resides in some person or other, though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in the grantor and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee.] Yet sometimes the fee may be in *abeyance*, that is, only in remembrance, intendment, and consideration of the law; there being no person *in esse*, in whom it can vest and abide; though the law considers it as always potentially existing (*o*). [This may be exemplified in the case of a parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in abeyance (*p*). And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold

Co. Litt. 18 a; 2 Saund. 388 b; Machell *v.* Clarke, Ld. Ray. 779; 2 Inst. 336; Edward Seymour's case, 10 Rep. 97 b.

(*n*) Litt. s. 360; Co. Litt. 223 a; 1 Cr. Dig. 20.

(*o*) As to the doctrine of *abeyance*, see Co. Litt. 341 a, 342 b; Litt. 646, 647; Butler's Fearne, p. 360, 9th ed.; 1 Prest. Est. 503; Camoy's Peerage Case, 5 Bing. N. C. 763; et vide sup. 227, n. (*g*). Blackstone (vol. ii. p. 107) considers abeyance as also importing "*expectation*," and Co. Litt. 342 b, is to the same effect. Yet Lord Coke himself afterwards remarks that the fee simple may be in *perpetual* abeyance (as in the case of a parson) "without any expectation to come "*in esse*." (Co. Litt. 343 a.) Littleton's exposition, therefore, which is that followed in the text, seems to be the more correct; see Litt. s. 646.

(*p*) Litt. s. 646. Lord Coke, however, holds that a parson has for some purposes a fee simple qualified; Co. Litt. 341 a.

[of his glebe is in abeyance, until a successor is named, and then it vests in the successor (*q*).

The word "heirs" used to be necessary in the grant or donation, in order to make a fee or inheritance. For if the land was given to a man for ever, or to him and his assigns for ever, this vested in him but an estate for life (*r*). This very great nicety about the insertion of the word "heirs" in all donations, in order to vest a fee, was plainly a relic of the feudal strictness, by which it was required that the form of the donation should be punctually pursued; or that, as Craig expresses it in the words of Baldus, "*donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit*" (*s*). And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs.] But this old rule, after having subsisted for centuries, has been at length abolished by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, which has enacted that it shall not be necessary to use the word "heirs" in any deed, but it shall be sufficient to say that the conveyance is "in fee simple" or "in fee tail" as the case may be.

Moreover, even the old rule had some exceptions—and particularly had never been held to extend strictly to dispositions *by will;* in which, as they were introduced at the time when the feudal rigour was apace wearing out, a more liberal construction has always been allowed: and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee simple, the devisee has always been construed to have an estate of inheritance; for the intention of the devisor was sufficiently plain from the words of perpetuity annexed, though he had omitted

(*q*) Litt. s. 647; Co. Litt. 342 b. 2 W. Bl. 1185.
(*r*) Litt. s. 1; Wright *v.* Dowley, (*s*) L. 1, t. 9, s. 17.

the legal words of inheritance (*t*). If, however, the devise were simply to a man and "his assigns," without annexing any words of perpetuity, the devisee was, at one time, held to take only an estate for life; for it did not appear that the devisor intended any more. A new rule of construction, however, has been now provided; for by the New Wills Act (7 Will. IV. & 1 Vict. c. 26), s. 28, it was enacted, that where any real estate shall (after the passing of that Act) be devised without words of limitation, it shall be construed to pass the whole interest of which the testator had power to dispose, *unless* a contrary intention should appear by the will in question.

Estates in fee simple are divided into three sorts (*u*) :—

(*t*) Thus, too, (even before the New Wills Act,) a devisee of an indefinite estate, if he was charged *personally* with the payment of debts or legacies, was held to take the fee; though it was otherwise if the *estate devised to him* was so charged. (See Doe *d.* Sams *v.* Garlick, 14 Mee. & W. 698; Manning *v.* Taylor, Law Rep., 1 Exch. 235.)

(*u*) This division of fees simple is given by Lord Coke as the common one in his time (Co. Litt. 1 b); and is followed by Mr. Justice Powell, in Idle *v.* Cooke, (Lord Raym. 1148,) and by the Court of King's Bench in Martin *v.* Strachan, (reported 5 T. R. 107, *in notis.*) It is to be observed, however, that the two last classes are both referred by Lord Coke to a more general head of fees simple *determinable*. Thus, in Edward Seymour's case (10 Rep. 97 b) estates of inheritance are distributed with great clearness and precision, as follows:—First, they are either *fee simple* or *fee tail*. Estates in fee simple are either *absolute* (i. e. indeterminable) or *determinable*. Those which are determinable are either *derived out of an estate in fee simple absolute*, or *derived out of an estate in fee tail*. The first of these are created either by way of *condition*, or by way of *limitation;* the first sort being called fees simple *conditional*, the second, fees simple *limited and qualified*. The fee simple derived out of an estate tail, Lord Coke at the same place proceeds to exemplify by the case where tenant in tail bargains and sells to W. H. and his heirs; in such a case W. H. used to take an estate in fee simple, as long as the tenant in tail had heirs of his body, derived out of the estate tail, and which fee simple in W. H. would now be called exclusively a *base fee*. But at the present day, W. H. would clearly take in such a case a mere fee simple estate during the life of the tenant in tail himself, for there would be no bar of the issue of such tenant by the bargain and sale. (See also Walsingham's case, Plowd. 557; Willion *v.* Berkley, ibid. 241.)

1, *fee simple absolute*; 2, *fee simple qualified*; 3, *fee simple conditional*—a division which relates, it is to be observed, to the *quality*, not the *quantity*, of the estate; for it is laid down by Lord Coke that in the latter respect, both fees qualified and fees conditional are equivalent to fees simple absolute (*x*).

1. The fee simple absolute is free from all qualification, and requires no particular remark; the two others involve considerations of some intricacy.

2. [A qualified fee is such a one as, having a qualification subjoined thereto, must be determined whenever annexed to it is at an end (*y*). As, in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; here, whenever A. or the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. Thus, when Henry the sixth granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle;—in this instance John Talbot had a qualified fee in that dignity, and the instant he or his heirs quitted the seigniory of this manor, the dignity was at an end (*z*).] Such an estate is a fee simple, because it is limited to the heirs general, and may by possibility endure for ever; yet, as that duration depends upon the concurrence of collateral circumstances, which qualify the donation, it is therefore not an absolute, but a qualified or (as it has occasionally been called) a *base* fee (*a*).

(*x*) Co. Litt. 18 a.

(*y*) As to a qualified fee simple, see Lord Cardigan *v.* Armitage, 2 Barn. & Cres. 202.

(*z*) Co. Litt. 27 a.

(*a*) It is proper to observe, with respect to this use of the term *base* fee, that it has also a more restricted application, viz., to that species of qualified fee which is created where tenant in tail conveys his estate by a conveyance barring his issue, but not the remainderman, to another and his heirs, and which Lord Coke describes as a determinable fee derived out of an estate tail; and in the Act for the Abolition of Fines and Recoveries, 3 & 4 Will. 4, c. 74, its meaning is by express

3. A conditional fee seems properly to comprise every fee simple granted upon condition (*b*), but the term is usually understood to refer to that particular species called a conditional fee at common law.

[A conditional fee at common law was a fee restrained in its form of donation to some particular heirs, exclusive of others: "*donatio stricta et coarctata; sicut certis hæredibus, quibusdam a successione exclusis*" (*c*): as to the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of his collateral heirs; or, to the heirs *male of his body*, in exclusion both of collaterals and of lineal females also (*d*).] We say restrained in the *form of donation;* because, in point of legal *effect*, such a gift was construed by the judges of former days, as conferring not an estate descendible to some particular heirs, but a fee simple, though a fee simple subject to some condition (*e*). For they held that a gift to a man and the heirs of his body was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body (*f*). They therefore called it a fee simple on condition that the donee had issue. So that, as soon as he had any issue *born*, his estate was supposed, by the performance in some sense of the condition, to become absolute (*g*); at least for these three purposes:—1. To enable the tenant to aliene the land, and thereby to bar the interest not only of his own issue, but also of the donor in the reversion (*h*). 2. To subject the tenant to forfeit his estate for treason, which till issue born he was not able to

provision so confined (so far as that statute is concerned).

(*b*) Edward Seymour's case, 10 Rep. 97 b.

(*c*) Flet. l. 3, c. 3, s. 5.

(*d*) Blackstone remarks here (vol. ii. p. 110), that there are strong traces of such particular limitation in our earliest Saxon laws, and cites Ll. Ælfred. c. 37.

Nevil's case, 7 Rep. 34 b.

(*f*) Stat. *De donis* (13 Edw. 1, Stat. West. Sec. c. 1); Willion *v.* Berkley, Plowd. 241.

(*g*) It was performed, says Lord Coke, "to some intent;" (Nevil's case, ubi sup.)

(*h*) Ibid.; Co. Litt. 19 a; 2 Inst. 333; and see Doe *v.* Clark, 5 B. & Ald. 461.

do, except for the period of his own life; for otherwise the inheritance of the issue, and reversion of the donor, might have been defeated (*i*). 3. [To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue (*k*). And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious: and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect, without much regard to the right of succession intended to be vested in the issue.] However, if the grantee survived his issue, and afterwards died without making any alienation, the land by force of the condition reverted to the donor, and therefore the performance of the condition by the birth of issue did not alter the course of descent till alienation in fact took place (*l*). For which reason, in order to subject his land to the ordinary course of descent, the donee of a conditional fee-simple took care to aliene as soon as he had performed the condition by having issue; and, afterwards by repurchase of the land to obtain a fee simple absolute therein that would descend to his heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees: a subject of no great practical importance, this kind of gift having been long since construed (as we shall presently see) in a different manner. But, as Lord Coke observes, these things, though they seem antient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such-like inheritances, as are not within the statutes of entail, and therefore remain as at the common law (*m*).

(*i*) Co. Litt. ubi sup.; 2 Inst. 334.

(*k*) Co. Litt. 19 a.

(*l*) Nevil's case, 7 Rep. 34 b; Willion *v.* Berkley, Plowd. 247.

(*m*) Co. Lit. ubi sup. As to the things capable of being entailed, see Co. Litt. by Harg. 20 a, n. (3), n. (5); Moore *v.* Lord Plymouth, 7 Taunt. 614.

II. The subject of conditional fees leads us, by a natural introduction, to our second general division of estates of inheritance (*n*)—namely, *estates in fee-tail*, or, as they are more concisely termed, *estates tail*. An estate tail is that which a man hath to hold to him and the heirs of his body, or to him and particular heirs of his body (*o*); being, as to the form of donation, the same kind of estate that we have just been considering under the name of fee-simple conditional; and indeed in that light it was at first contemplated (*p*). But by force of a statute to be presently mentioned, and of the judicial construction which that statute received (*q*), another character has been long attached to an estate thus limited—viz. that of an estate *tail;* the incidents or consequences of which are very different from those of a fee simple conditional. The history of the change is as follows:—

[It was the inconveniences which attended a limited and fettered inheritance which probably induced the judges to give way to the subtle finesse of construction (for such it undoubtedly was), by which a limitation to a man and the heirs (or some particular heirs) of his body, was construed as a conditional estate in fee simple. But, on the other hand, the nobility (who were willing to perpetuate their possessions in their own families), in order to put a stop to this construction of the limitation, procured the statute of Westminster the second (commonly called the statute *De donis conditionalibus*) to be made (*r*); which Act paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever.] This statute enacted that thenceforth the will of the donor should be observed *secundùm formam in cartâ doni expressam;* and that tenements given to a man and the heirs of his body, or to the

(*n*) Vide sup. p. 233.

(*o*) As to this estate, see Co. Litt. 18 b—28 b.

Willion *v.* Berkley, Plowd. 237.

(*q*) 2 Inst. 335.

(*r*) 13 Edw. 1 (stat. Westm. Sec.), c. 1 (A.D. 1285).

his body, or the like, should, notwithstanding any alienation by the donee, go to his issue, i any; or, if issue failed, should revert to the

Upon the construction of this act of parliament, the judges determined that, under such a limitation, the donee had no longer a conditional fee simple; but they divided the fee simple into two parts (*s*), vesting in the donee a new kind of particular estate, which they denominated a *fee-tail* (*t*); and leaving in the donor the ultimate fee simple of the land, expectant on the failure of issue of the donee (*u*). And hence it is that Littleton tells us, that tenant in fee-tail is by virtue of the statute of Westminster the second (*v*).

The expectant estate of the donor by virtue of this statute, is considered as of a different nature from the right which belonged, at the common law, to the donor of a fee conditional: for his reverter was only in possibility, being dependent on the contingency of the donee's estate determining by force of the condition; but the reversion of the donor of an estate tail is the residue of a fee, and therefore a fixed or vested interest (*x*).

By the express provision of the statute *De donis*, the alienation of the tenant in tail was not to defeat the succession of the issue, or the reversion of the donor and his heirs. Such alienation was not, however, a void act,—for his leases, though liable to be defeated after his death by those claiming under the entail, were in other respects

(*s*) 2 Inst. 335; Willion *v.* Berkley, Plowd. 241; Butler's Fearne, 382 (n.), 9th edit.

(*t*) The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists; (see Craig, l. 1, t. 10, s. 24, 25;) among whom it signified any mutilated or truncated inheritance; being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed.—Spelm. Gloss. ad verb. Feodum.

(*u*) Inst. ubi sup.

(*v*) S. 13.

(*x*) Inst. ubi sup.; Co. Litt. 22 a. See the remarks on this subject in Bac. Abr. tit. Remainder and Reversion.

effectual; and if he conveyed his estate to another and his heirs, the alienee took a *base fee* (*y*), that is to say, a fee simple to hold as long as the tenant in tail lived or had heirs of his body (*z*). But such fee was determinable at an earlier period, as it might be avoided on the death of the tenant in tail by the entry of his issue (*a*).

Estates-tail are either *special* or *general*. Tail-general is where lands and tenements are given to one and the *heirs of his body* begotten: and this is called tail-general, because, how often soever such donee in tail be married, his issue, by all and every such marriage, is, in successive order, capable of inheriting the estate tail *per formam doni* (*b*). Tenant in tail-special is where the gift is restrained to the heirs of the donee's body by a particular person; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife* to be begotten; here no issue can inherit but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail (*c*). And here we may observe that the words of inheritance (to him and his *heirs*) give him an

(*y*) Vide sup. p. 238, n. (*u*).

(*z*) Such alienation, though wrongful, did not work a *forfeiture*, but, if made by certain modes of conveyance, was a *discontinuance*, which deprived both the issue and the reversioner of their *right of entry*, and left them only to their *right of action*. (See Co. Litt. 328 a; 2 Inst. 335.)

(*a*) Co. Litt. by Butler, 331 a, n. (1); Machell *v.* Clarke, Ld. Raym. 778; Salk. 618, S. C.; Seymour's case, 10 Rep. 97 b; Walsingham's case, Plowd. 557; Goodright *v.* Shilson, Burr. 1703.

(*b*) Litt. ss. 14, 15.

(*c*) In the particular case where an estate in frankmarriage (*in libero maritagio*) is given to a man on his marriage with the daughter or kinswoman of the donor, such donees are tenants in special tail. These estates are now out of use; but Blackstone tells us (vol. ii. p. 115) that the word "frankmarriage" *ex vi termini*, not only created an inheritance, but likewise limited that inheritance, supplying not only words of descent, but of procreation also. He adds, that such donees were liable to no service but fealty; for a rent reserved thereon would have been held void, till the fourth degree of consanguinity were passed between the respective issues of the donor and of the donee. (See Litt. ss. 19, 20.)

estate in fee; but they being heirs *of his body* this makes it a fee-tail; and the person being also limited on whom such heirs shall be begotten, (viz. *Mary his present wife*,) this makes it a fee-tail special.

[Estates in "general" and "special" tail are further diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or in tail *female*. As if lands be given to a man and the *heirs male of his body* begotten, this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife* begotten, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor *è converso* the heirs male, in case of the gift in tail female (*d*). Thus, if the donee in tail male hath a daughter who dies leaving a son, such grandson in this case cannot inherit the estate tail; for he cannot deduce his descent wholly by heirs male (*e*). And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot convey his descent either wholly in the male or wholly in the female

As, in a deed, the word *heirs* used to be necessary to create a fee, so, in further imitation of the strictness of the feudal donation, the word *body*, or some other words of procreation (*g*), used to be necessary to make it a fee-tail, and to ascertain to what heirs in particular the fee was limited. If therefore either the words of inheritance or the words of procreation were omitted in the grant, albeit the others were inserted, this would not make an estate-tail. As if the grant were to a man and the *issue of his body*, to a man and his *seed*, to a man and his *children*

(*d*) Litt. ss. 21, 22.
(*e*) Ib. s. 24; Co. Litt. 25 b.
(*f*) Ibid.
(*g*) Beresford's case, 7 Rep. 40.

[or *offspring;* all these were only estates for life, for there were wanting the words of inheritance, "his heirs" (*h*).] So, on the other hand, a gift to a man and his *heirs male*, or *heirs female*, was an estate in fee-simple, and not in fee-tail; for there were no words to ascertain the body out of which they should issue; which was indispensable to an estate of the latter description (*i*); and every estate in fee, which was not in tail, must of necessity have been and be fee simple (*k*), as all fees consisted and consist either of one kind or the other (*l*). Upon such a limitation, too, as last supposed, heirs both male and female should inherit (*m*); for a descent in fee simple is inconsistent (by our definition) with a restriction to heirs of either sex (*n*). But this antient necessity of using both the word *heirs*, and also the word *body*, for the grant of an estate tail, after having subsisted for centuries, has been abolished by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, which has enacted, that for the creation of an estate tail it shall not be necessary to use the words "heirs of the body," but it shall suffice to say "in fee tail," with or without the word *male* or *female*, as may be required. It is to be observed that in last wills and testaments a greater indulgence has always been allowed as to the manner of expounding a donation than in a conveyance *inter vivos* (*o*); and therefore an estate tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male;* or by other irregular modes of expression (*p*), provided the words of the will be sufficient to indicate an intention to confer

(*h*) Co. Litt. 20; Frogmorton *v.* Wharrey, 2 W. Bla. 728; 3 Will. 125, 144, S. C.

(*i*) Litt. s. 31; Co. Litt. 7 a; Abraham *v.* Twigg, Cro. Eliz. 478; Earl of Oxford's case, W. Jones, 105. A grant in such terms by the *Crown*, has been held void.—Ibid. Co. Litt. 27 a.

(*k*) Co. Litt. 27 b.

(*l*) Vide sup. p. 233.

(*m*) Litt. ubi sup.

(*n*) Vide sup. p. 233.

(*o*) Vide sup. p. 237.

(*p*) 2 Bl. Com. p. 115; Co. Litt. 9 b, 27 a; see Mellish *v.* Mellish, 2 B. & Cr. 520; Doe *d.* Jearrad *v.* Bannister, 7 M. & W. 298; Good *v.* Good, 7 El. & Bl. 295.

an inheritance, but to restrain it to the descendants of the devisee.

We have seen that lands cannot (since the statute *Quia Emptores*) be conveyed in fee simple, to be holden of the grantor; but that the holding must be of him to whose seigniory the fee belongs (*q*). It is otherwise, however, with respect to a gift in tail. For if a tenant in fee simple grants an estate tail out of it, (the reversion remaining in the donor,) the donee in tail shall hold of the donor, by fealty and such other services as may be reserved; or if none be reserved, then by fealty and such other services as the donor himself renders to the next lord paramount (*r*). But the tenure thus created between the donor and the donee in tail is described as *imperfect*, whereas that which subsists between the tenant in fee and the chief lord is said to be *perfect* in its kind (*s*).

[Thus much for the nature of estates tail: the establishment of which family law, as it is properly styled by Pigott (*t*), occasioned infinite difficulties and disputes (*u*). Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for if such leases had been held valid, then under colour of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full; and treasons were encouraged; as estates tail were not originally liable to forfeiture longer than for the tenant's life. So that they

Vide sup. p. 234.

(*r*) Litt. s. 19; Co. Litt. 23 a, 93 a, 143 a, 68 b, n. (5), by Harg.; 2 Inst. 501, 505; Willion *v.* Berkley, Plowd. 237; Bingham's case, 2 Rep. 92 b.

(*s*) Co. Cop. s. 31.

(*t*) Com. Recov. 5.

(*u*) Chudleigh's case, 1 Rep. 131 b.

[were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm (*x*). But as the nobility were always fond of the statute *De donis*, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal of it by the legislature; and, therefore, by the connivance of an active and politic prince, a method was devised to evade it.

Nearly two hundred years intervened between the making of the statute *De donis* and the application of *common recoveries* to this intent, in the twelfth year of Edward the fourth (*y*); but these were then openly declared by the judges to be a sufficient bar of an estate tail (*z*). For though the courts had, so long before as the reign of Edward the third, very frequently hinted their opinion that a bar might be effected upon these principles (*a*), yet it never was carried into execution, until Edward the fourth—observing (in the disputes between the houses of York and Lancaster) how little effect attainders had upon traitors protected by the sanctuary of entails—contrived (*b*), that Taltarum's case should be brought before the court (*c*); wherein, in consequence of the principles there laid down, it was in effect determined, that a common recovery suffered by tenant in tail should convert his estate into a fee simple absolute; and bar all persons whatever claiming the estate tail, or any estate ulterior thereto (*d*). What common recoveries

(*x*) Co. Litt. 19 b; Hunt *v.* Gateley, Moor, 156; Mary Portington's case, 10 Rep. 38.

(*y*) A. D. 1472.

(*z*) Chudleigh's case, 1 Rep. 131; Mildmay's case, 6 Rep. 40.

(*a*) Mary Portington's case, 10 Rep. 37, 38.

(*b*) Pigott, 8. Blackstone (vol. ii. p. 117) says he *suffered* it to be brought, but the expression of Pigott is, that he "brought it on the stage."

(*c*) Year Book, 12 Edw. IV., 14, 19; Fitzh. Abr. tit. Faux Recov. 20; Bro. Abr. ibid. 30; tit. Recov. in Value, 19; tit. Taile, 36. See Hist. Eng. Law, by Reeves, vol. iii. p. 328.

(*d*) Martin *v.* Strachan, 5 T. R. 107, (n.); Willes, 449; Taylor *v.* Horde, 1 Burr. 115; Smith *v.* Clif-

[were, both in their nature and consequences, and why they were allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present it may suffice to say, that they were fictitious proceedings, introduced by a kind of *pia fraus*, to elude the statute *De donis;* an Act which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal; and that these recoveries, however clandestinely introduced, afterwards became by long use and acquiescence a most common assurance of lands; and were looked upon as the legal mode of conveyance, by which a tenant in tail might dispose of his lands and tenements, so that no court would suffer them to be shaken or reflected on (*e*).

This expedient having greatly abridged estates tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeiture for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them re-settled in a similar manner to suit the convenience of families, had address enough to procure a statute to be passed (26 Henry VIII. c. 13), whereby all estates "of inheritance," under which general words estates-tail in possession were covertly included, were declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered in order of time was by the statute 32 Henry VIII. c. 28; whereby certain *leases* made by tenants in tail not tending to the prejudice of the issue, were allowed to bind the issue in tail, though not the remainderman or reversioner (*f*). But they received a more violent blow, in the same session of

ford, 1 T. R. 738; and see First Real Property Report, p. 22.

(*e*) As to recoveries, see 11 Hen. 7, c. 20; 7 Hen. 8, c. 4; 34 & 35 Hen. 8, c. 20; 14 Eliz. c. 8; 14 Geo. 2, c. 20; et post, bk. II. pt. I. c. XIX.

(*f*) Co. Litt. 45 b.

[parliament, by the construction put upon the statute "of fines," (4 Henry VII. c. 24,) by the statute 32 Henry VIII. c. 36; which declared that mode of conveyance called a *fine* (which was another species of fictitious proceeding), when duly levied by tenant in tail, to be a complete bar to him and his heirs claiming under such entail. This was evidently agreeable to the intention of Henry the seventh, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles: but as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched in his Act under covert and obscure expressions: and the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *De donis* had expressly declared that they should *not* be a bar to estates-tail. But the statute of Henry the eighth, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention.]

By an enactment of the succeeding year (33 Hen.VIII. c. 39, s. 75), estates-tail were rendered liable to be charged for payment of debts due to the king by record or special contract; and afterwards (by 21 Jac. I. c. 19, s. 12) they were subjected to be sold for the benefit of the creditors, if the tenant became *bankrupt* (*g*).

But the most extensive and effectual relaxation is that introduced by the statute 3 & 4 Will. IV. c. 74 (usually called the Act for the Abolition of Fines and Recoveries), passed in the year 1833; for this enables a tenant in tail,

(*g*) Blackstone remarks (vol. ii. p. 119) that an appointment by tenant in tail to a *charitable use* was rendered, by 43 Eliz. c. 4, good without either fine or recovery; and he cites Attorney-General *v.* Rye, 2 Vern. 453; Chan. Prec. 16.

by an ordinary deed of conveyance, provided it be *duly enrolled* in Chancery within six months after execution, and without any resort to the indirect and operose expedient of a fine or recovery (which the statute wholly abolishes), to aliene the lands entailed in fee-simple absolute, or for any less estate; and thereby either *in toto* or *pro tanto* to bar himself and his issue, as well as all persons having any ulterior interest therein (*h*). Yet this provision is subject to an important qualification, designed for the protection of family settlements. For in these, it is usual to settle a life estate (which is a freehold interest) on the parent, prior to an estate tail limited to the children; and the nature of a *recovery*, by which alone interests ulterior to such estate tail could formerly be barred, was to make the concurrence of the immediate tenant of the freehold indispensable to the validity of that proceeding. In order, therefore, to continue to the parent (or other prior taker of the life estate) a control of the same general description, the Act provides that where, under the same settlement which created such estate tail, a prior estate of freehold, or for years determinable with life, shall have been conferred,—it shall not be competent for the tenant in tail to bar any estate taking effect upon the determination of the estate tail, without consent of the person to whom such prior estate was given: who receives for that reason the appellation of *protector of the settlement* (*i*). But the object not being to restrain the power of the tenant in tail over the estate tail itself, (which he could have barred, before the statute, by *fine*, without any other person's concurrence,) his alienation, in the manner prescribed by the Act, is allowed to be effectual even without the consent of

(*h*) 3 & 4 Will. 4, c. 74, s. 15. Some few species of estates tail are, however, excepted from this Act. (Vide post, c. XIX., where this subject is further explained.)

(*i*) 3 & 4 Will. 4, c. 74, s. 22. The estates, however, of a dowress, of a bare trustee, and of some others, do not qualify for the protectorship (ss. 26, 27).

the protector, so far as regards the barring of such tenant in tail and his issue (*k*).

Even subsequently to the passing of this Act, however, one of the antient and justly obnoxious immunities of the owner of an entailed estate still remained without disturbance, viz. that such estate (save only in the case of his becoming bankrupt) was not liable to his debts. But this also was removed by the statute 1 & 2 Vict. c. 110, in the year 1838—by the effect of which a man's *entailed* estates are now equally liable to satisfy his judgment debts, as any other estates of which he may be possessed or in which he may have an interest (*l*).

Finally, with reference to *leases* of entailed estates, we may remark that the effect of the same statute of 3 & 4 Will. IV. c. 74, above referred to, is to enable a tenant in tail in possession to make effectual leases *without* the necessity of enrolment in Chancery, for terms not exceeding twenty-one years, if made at a rack-rent or not less than five-sixth parts of a rack-rent (*m*). And that still more recently, by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), it has been enacted (*n*), that any person entitled to the possession, or to the receipt of rents and profits under a *settlement* made after 1st November, 1856 (*o*), either for life, or for a term of years determinable with any life or lives, or for any greater estate, (which brings an *estate tail* within the provision,) either in his own right, or in right of his wife, may demise the same from time to time, (unless the settlement shall contain an express declaration that it shall not be lawful to make such demise,) for any term not exceeding twenty-one

Sect. 34.

(*l*) 1 & 2 Vict. c. 110, s. 13.

(*m*) 3 & 4 Will. 4, c. 74, ss. 15, 40, 41.

(*n*) This Act repeals and consolidates a group of enactments on the subject of settled estates, namely, the 19 & 20 Vict. c. 120; 21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33, and 39 & 40 Vict. c. 30.

(*o*) As to the term "settlement," as used in the Act, see 40 & 41 Vict. c. 18, s. 2.

years, in such form and with such restrictions as in the Act prescribed (*p*).

(*p*) Sect. 46. In addition to this general provision, the Act contains others enabling the High Court of Justice to authorize almost *any* lease, sale, or act in respect of a settled estate which may seem expedient for the interests of all parties entitled under the settlement, and being such as the settlor himself might have authorized. (See 40 & 41 Vict. c. 18, ss. 4, 39.)

It may be convenient here to notice that by certain modern statutes, facilities are also given to owners of settled estates to make permanent improvements on the same (as by the erection of a suitable residence for themselves), and to charge a portion of the expense on those who come after them. See 27 & 28 Vict. c. 114 (Improvement of Land Act, 1864); 33 & 34 Vict. c. 56 (Limited Owners' Residences Act, 1870), as amended by 34 & 35 Vict. c. 84; 40 & 41 Vict. c. 31 (Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877); and see also the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

CHAPTER IV.

OF FREEHOLD ESTATES NOT OF INHERITANCE.

We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only (*a*). And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law (*b*). We will first consider the former class, and then the different species of the latter.

I. [Those estates for life may be termed conventional which are expressly created by some deed or will; and they arise when an estate is limited to a man to hold the same for the term of his own life, or for that of any other person, or for more lives than one; in any of which cases he is styled tenant for life: only, when he holds the estate by the life of another, he is usually called tenant *pur autre vie* (*c*). These estates for life are, like inheritances, of a feudal nature: and were for some time the highest estate that any man could have in a feud; for feuds were not, at first, hereditary. They were, accordingly, originally conferred with the same feudal solemnities, the same investiture or livery of seisin, as fees themselves

(*a*) Vide sup. p. 230. It may be worth remarking, that the legal tenant for life (and not the remainderman) is, as the general rule, entitled to the custody of the *title-deeds*. (See Allwood *v.* Heywood, 1 Hurl. & C. 745; Leathes *v.* Leathes, Law Rep*t*, 5 Ch. D. 221.)

(*b*) Wright's Tenures, 190.

(*c*) Litt. s. 56.

[were;] and as in an estate of inheritance in possession, the tenant is said to be "seised in his demesne as of fee," or of "fee-tail" (*d*),—so in an estate for life in possession, he is said to be "seised in his demesne as of freehold."

[Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As if one by deed grants to A. B. the manor of Dale, this makes him tenant for life (*e*). For though, as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life *of the grantee*, in case the grantor hath authority to make such a grant (*f*); for an estate for a man's own life is more beneficial and of a higher nature than for any other life: and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of grants by the crown (*g*).

Such estates for life will, generally speaking, endure as long as the life for which they are granted (*h*): but there are some estates for life, which may determine upon future contingencies, before the life for which they are created expires. As if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens,—when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone (*i*). Yet, while they subsist they are reckoned estates for life (*k*); because

(*d*) Vide sup. p. 233.

(*e*) Co. Litt. 42 a, 183 a.

(*f*) Ibid.

(*g*) Co. Litt. 36 a, 183 a.

(*h*) If tenant for life has not been heard of for the space of *seven* years, a presumption of his death arises, under stat. 18 & 19 Car. 2, c. 11, and 6 Anne, c. 72.

(*i*) Co. Litt. 42 a; Boraston's case, 3 Rep. 19 a.

(*k*) Co. Litt. 42 a.

[the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen.] And, moreover, in case an estate be granted to a man for his life generally, it might also have determined by his *civil* death; that is to say, as already explained, by his becoming outlawed or attainted (*l*).

On the gift of an estate tail we may remember that the donee holds of the donor, by fealty and such other services as may be reserved between them; or if none be reserved, then by fealty, and the same services as are due from the donor to the next superior lord (*m*). In like manner, upon a lease for life, a tenure (of the imperfect kind) is thereby created between the lessor and lessee, and the latter will hold of the former, by the nominal obligation of fealty, and such other services as may be reserved; but if no other be reserved, the lessee will hold not by those due from the lessor himself, but by fealty only (*n*).

The incidents to an estate for life (whether conventional or legal) are principally the following:—

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take, upon the land demised to him, reasonable *estovers* or *botes*, that is, an allowance of wood for fuel, repairs, and the like: the term estovers being derived from the French word *estoffer*, to furnish; and *bote*, which is of Saxon derivation, being used by us as synonymous with estovers. And here we may remark, that when the allowance is for fuel, it is called house-bote, and sometimes fire-bote; when for making and repairing the instruments of husbandry, plough-bote and cart-bote; when for repairing hedges and fences, it is termed hay-bote or hedge-bote (*o*). However, the term

(*l*) Vide sup. p. 141.
(*m*) Vide sup. p. 247.
(*n*) Co. Litt. 143 a, 23 a, 93 a, 68 b, n. (5), by Harg.; Litt. s. 132.
(*o*) See 2 Bl. Com. 35.

bote and its compounds, though still technically proper, has somewhat fallen out of use.

While a tenant for life has this privilege of *botes*, he is, on the other hand, answerable by law for *waste*, that is, any spoil and destruction which he does, or allows to be done, to the premises during his tenancy, to the injury of the person entitled to the inheritance (*p*). And there are two kinds of waste; that which is *voluntary* and that which is *permissive;* the first by the tenant's voluntary act, as where he pulls down a wall, or cuts down timber (*q*); the other by his default, as by suffering a wall to fall down for want of necessary repair (*r*). Estates for life are sometimes limited, however, with an express clause, that the tenant shall hold the land *without impeachment of waste;* but even in such cases the courts of equity have interfered so as to restrain any unwarrantable and gratuitous injury to the inheritance, as the gratuitous felling of ornamental timber, and the like,—and the law on this head having previously to the union of the courts effected by the Judicature Act, 1873, been differently administered in the courts of *law* (*s*), it was by that statute enacted that an estate for life, without impeachment of waste, should not confer or be deemed to have conferred on the tenant any legal right to commit waste of the description known as "equitable" waste, unless an intention to confer such right should expressly appear by the instrument creating the estate (*t*).

(*p*) Co. Litt. 53; 2 Bl. Com. 281; 3 Bl. Com. 223. See Seagram *v.* Knight, Law Rep., 2 Ch. App. 628.

(*q*) Tenant for life may not cut timber. The question of what timber is, depends, first, on general law; and, secondly, on special custom. See Honywood *v.* Honywood, Law Rep., 18 Eq. Ca. 346, in which the position of a tenant for life, in this matter, is carefully considered.

(*r*) As to *permissive* waste, see Yellowly *v.* Gower, 11 Exch. 274; Powys *v.* Blagrove, 4 De Gex, M. & G. 448.

(*s*) See Herlakenden's case, 4 Rep. 63 a; Dowman's case, 9 Rep. 10 b; Pyne *v.* Dor, 1 T. R. 55.

(*t*) 36 & 37 Vict. c. 66, s. 25, sub-s. (3). As to *equitable* waste, see Ashton *v.* Ashton, 1 Ves. sen. 254; Burgess *v.* Lamb, 16 Ves. 174; Lushington *v.* Boldero, 6 Madd.

2. Tenant for life cannot, apart from statute, make leases to bind those in remainder. But a person entitled to the possession or to the receipt of the rents and profits of any estate under a settlement made after 1st November, 1856, as tenant for life, or for term of years determinable with his life,—either in his own right, or in right of his wife,—is now by statute enabled to make an effectual *lease* of the lands, for the period of twenty-one years (*u*); and also to effect permanent improvements on the land (as by *draining* it, or by erecting thereon a suitable residence for himself), and to charge a portion of the expense on the remainderman or reversioner

3. [Tenant for life, or his representatives, shall not be prejudiced by the determination of his estate, where such determination is sudden and unforeseen. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his representatives shall have the *emblements*, or profits of the crop: for the estate was determined by the act of God; and it is a maxim in the law, that *actus i nemini facit injuriam* (*y*). The emblements, therefore, are given them to compensate for the labour and expense of tilling, manuring and sowing the lands,—and also for the encouragement of husbandry, which being a public benefit tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give. So, by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was

149; Morris *v.* Morris, 15 Sim. 505; 1 Fonb. Eq. 33, n.

(*u*) There are, however, certain restrictions, and in particular the principal mansion house and demesnes are excepted. (See 40 & 41 Vict. c. 18, s. 46.)

(*x*) See the statutes cited sup. p. 252, n. (*n*); and see also the Settled Land Act, 1882.

(*y*) As to emblements generally, see Co. Litt. 55 a, 55 b; Graves *v.* Weld, 5 Barn. & Ad. 105; Davis *v.* Eyton, 7 Bing. 154. As to emblements as between the *executor and devisee*, see Shep. Touch. by Preston, p. 472; Williams on Executors, p. 634; Cooper *v.* Woolfit, 2 H. & N. 122.

[also entitled to the profits of the whole year; but if the tenant died between the beginning of March and the end of August, his heirs received the whole (*z*). And from hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestui que vie*, that is to say, he during whose life the land is held, dies after the corn sown; the tenant *pur autre vie* shall have the emblements.] The same is also the rule, if a life estate be determined by the act of law. Therefore, in a case where a lease was made to husband and wife during coverture, whereby they acquired a determinable estate for life, and the husband sowed the land; after which they were divorced; it was held that the husband should have the emblements; for the sentence of divorce was the act of law (*a*). [But if an estate for life be determined by the tenant's *own act*, (as by forfeiture for waste committed, or if tenant for life during widowhood should think proper to marry,) in these, and similar cases, the tenants having thus determined the estate by their own acts, shall not be entitled to take the emblements (*b*). The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit; though not to fruit trees, grass, and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth (*c*). For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The advantages of emblements were particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11, s. 6—the reason being that all persons who are presented to any ecclesiastical

(*z*) Feud. l. 2, t. 28.
(*a*) Oland's case, 5 Rep. 116.
(*b*) Knevett *v.* Pool, Cro. Eliz. 461; 1 Roll. Abr. 727.
(*c*) Co. Litt. 55 a, 55 b; 1 Roll. Abr. 728.

[benefice are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.]

4. [A fourth incident to estates for life relates to the under-tenants or lessees. For if tenant for life under-let, the lessee, by the common law, has the same, nay greater, indulgences than his lessor. The same,—for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place (*d*): and greater,—for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. Thus, too, in the case of a woman who holds *durante viduitate*: her taking husband is her own act, and therefore (as we have seen) deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the under-tenant of his emblements, for he is a stranger and could not prevent her (*e*).] And as regards tenants at rack-rent—that is, at the full value of their lands—who hold under landlords entitled for life or other uncertain interest, a more ample protection than was afforded by the doctrine of emblements at the common law, has been provided by a modern statute; it being enacted by 14 & 15 Vict. c. 25, s. 1 (*f*), that where in such cases the lease or other tenancy shall determine by the death or by cesser of the estate of the landlord, the tenant shall, instead of a claim to emblements, continue to hold until the expiration of the current year of his tenancy; at which time he shall (without being required or entitled to give or receive any notice) quit upon the terms of his holding, in the same manner as if his tenancy were determined by effluxion of time or other lawful

(*d*) Co. Litt. 55 b.
(*e*) Ibid.
(*f*) As to the tenancies to which this enactment applies, see Haines *v.* Welch, Law Rep., 4 C. P. 91.

means during the continuance of his landlord's estate: and the succeeding owner shall be entitled to recover, (as the landlord could have done if his interest had continued,) a fair proportion of the rent for the period elapsed from the termination of the landlord's interest to the time of the tenant's quitting: and the succeeding owner and tenant respectively shall be entitled (as against each other) to all the benefits, and be subject to all the terms, to which the landlord and tenant respectively would have been entitled or subject, in case the tenancy had determined in manner aforesaid at the expiration of such current year. This provision was made in favour of the lessees of life tenants; but a previous statute had remedied an injustice, to which at common law the representatives of life tenants were on their side exposed. For the lessees of such tenants might, if they pleased, on the death of their lessors, quit the premises, and pay no rent to any body for the occupation of the land since the last quarter-day, or other day assigned for payment of rent,—a most unreasonable advantage (*g*). [It was accordingly provided by 11 Geo. II. c. 19, that the executors or administrators of tenant for life, on whose death any demise determined, might recover of the lessee a rateable proportion of rent, from the last day of payment to the death of the lessor (*h*).] It has also been enacted by 4 & 5 Will. IV. c. 22, that where any demise *in writing* shall determine by death either of the person making the same (though he may not have been strictly tenant for life); or of the life or lives on which he held (*i*);—a proportion of the rent shall, in like manner, be recoverable from the lessee by his executors or administrators, or by himself, as the case may be. And, finally, by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), it has now been provided generally, and not merely

Clun's case, 10 Rep. 127.

(*h*) See Jenner *v.* Morgan, 1 P. Wms. 392; Mills *v.* Trumper, Law Rep., 4 Ch. App. 320.

(*i*) See Lock *v.* De Burgh, 4 De G. & Sm. 470; Llewellyn *v.* Rous, Law Rep., 2 Eq. Ca. 27.

in reference to life tenants and their lessees, that all rents, annuities, dividends and other periodical payments in the nature of income, (whether reserved or made payable under an instrument in writing or otherwise,) shall, like interest on money lent, be considered *as accruing from day to day;* and shall be apportionable (in the absence of an express stipulation to the contrary) in respect of time accordingly; and shall be recoverable by the representatives of the person who would have been entitled to the entire portion, had no such apportionment taken place (*j*).

II. [The next estate for life is of the legal kind, as contradistinguished from conventional: viz., that of tenant *in tail after the possibility of issue extinct* (*k*). This happens where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue; or, having left issue, that issue becomes extinct: in either of which cases the tenant in special tail becomes, for the residue of his life, tenant in tail after possibility of issue extinct. As where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue (*l*); in this case the man has an estate tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance, or *fee*, for he can have no heirs capable of taking *per formam doni* (*m*); and had it

(*j*) As to the construction of this statute, see Clive *v.* Clive, Law Rep., 7 Ch. App. 433; Jones *v.* Ogle, ib., 8 Ch. App. 192; Whitehead *v.* Whitehead, ib., 16 Eq. Ca. 528; Capron *v.* Capron, ib., 17 Eq. Ca. 288.

(*k*) As to the estate of tenant in tail after possibility of issue extinct, see Co. Litt. 27 b—28 b; Lewis Bowles's case, 11 Rep. 79 b; Williams *v.* Williams, 12 East, 209; 15 Ves. 419; Platt *v.* Powles, 2 Mau. & Sel. 65.

(*l*) Litt. s. 32.

(*m*) Bowles *v.* Berrie, 1 Roll.

[called him *tenant in tail without issue*, that would have only related to the present fact, and would not have excluded the possibility of future issue; and lastly, had he been styled *tenant in tail without possibility of issue*, that would have excluded time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out as this of tenant *in tail after possibility of issue extinct*, which, (with a precision peculiar to our own law,) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is by the death of the person out of whose body that issue was to spring; for no limitation, conveyance, or other human act, can make it. For if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them (*n*). A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties (*n*).]

This estate is of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life. For besides the name of tenant in tail, the tenant is so far in the condition of a tenant in tail properly so called, as to be dispunishable, (that is, not answerable,) for waste (*o*); and he formerly possessed some other of the privileges of a tenant in tail, connected with branches of the law which have now become extinct (*p*). But, on the other hand, his estate, in a general point of view, has always been considered as equivalent to an estate for life only (*q*); and therefore the

Rep. 184; Lewis Bowles's case, 11 Rep. 80.

(*n*) Co. Litt. 28 a.

(*o*) Ib., 27 b; see Whitfield *v.* Bewitt, 2 P. Wms. 240; Williams *v.* Williams, 12 East, 209.

(*p*) Co. Litt. ubi sup.; Lewis Bowles's case, 11 Rep. 80 a.

(*q*) By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2, it is expressly provided, that tenant in tail after possibility of issue extinct, shall be deemed a *tenant for life* for the purposes of that Act.

law permits a tenant in tail of this description, and an ordinary tenant for life, to make mutual alienation of their estates, by that particular method of conveyance called an *exchange;* which can take place, as we shall see hereafter, only in the case of estates that are equal in their nature (*r*).

III. Another estate for life of the legal kind, is the estate *by the curtesy of England;* that is to say, the estate which a man has, on the death of his wife, in the lands and tenements of which during the marriage she was seised in fee simple or fee tail; provided always he had issue by her born alive during the marriage, and capable of inheriting her estate (*s*). If the lands, however, be in gavelkind, the rule is so far different that he shall hold no more than a moiety, and that only while he lives unmarried; and, on the other hand, his title attaches whether he had issue born or not (*t*).

[This estate is said, in the Mirrour, to have been introduced by King Henry the first (*u*); and, notwithstanding its appellation, it is not peculiar to this realm: for it appears to have obtained also in Normandy; and to have been likewise used among the antient Germans (*x*). And

(*r*) As to an exchange, vide post, bk. II. pt. I. c. XVII.

(*s*) As to estate by the curtesy, see Co. Litt. 29 a—30 b; Menvill's case, 13 Rep. 23; 2 Saund. by Williams, 45, n. (5), 46, n. (q), 382, a, b; Buckworth *v.* Thirkell, 3 Bos. & Pul. 652, n.

(*t*) Robins. Gavelk. bk. ii. c. 1; and see Co. Litt. 30 a.

(*u*) Cap. 1, s. 3.

(*x*) 2 Bl. Com. p. 126, citing Grand Coustum. c. 119, and Lindenbrog. LL. Alman. t. 92. It is also said by Blackstone (citing Craig, l. 2, t. 19, s. 4), that it obtained in Scotland, where it was called *Curialitas.* And hence he infers that probably our word *curtesy* signified an attendance by the husband on the lord's court, (or *curia*), in the capacity of vassal or tenant in respect of the wife's land. Tenant by curtesy is said, however, by Littleton, to be so called, "because this is used in no "other realm but in England only." (Litt. s. 35.) And the manner in which the tenant is described in the old pleadings, "*Tenaunt per lei d'Engleterre,*" (Year-Book, Trin. 1 Edw. 2,) seems to confirm that etymology. See also Co. Litt. by Harg. 33 a, n. (5), and the Patent

[yet it is not generally apprehended to have been a consequence of feudal tenure; though some substantial feudal reasons may be given for its introduction, and some of the doctrines concerning it are of a feudal character (*y*). For if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands, in order to maintain the child; for which reason the heir apparent of a tenant by the curtesy, could not be in ward to the lord of the fee during the life of such tenant (*z*). As soon therefore as any child was born, and the father began to have a permanent interest in the lands, he became one of the *pares curiæ*, did homage to the lord, and was called tenant by the curtesy *initiate;* and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death of the infant. It may be proper to add that he was considered to hold not of the infant, but of the next lord of the fee (*a*).]

There are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife (*b*):—1. The marriage must be a legal one, and subsisting at the death; so that if void *ipso facto*, or avoided by a divorce, no estate by the curtesy can in either case be claimed (*c*). 2. The seisin of the wife must be an actual seisin, that is, possession of the lands: not a bare right to possess, which is a seisin *in law*, but an actual possession, which is a seisin *in deed* (*d*); nor may it be an estate in reversion on a freehold (*e*). On the

Roll of Hen. 3, there cited, which speaks of this estate as the *consuetudo et lex Angliæ*. But though the term may have been derived from a notion that the estate was peculiar to the law of England, it is clear that the supposed peculiarity did not in fact exist.

(*y*) See Wright's Ten. 194.

(*z*) F. N. B. 143.

(*a*) 2 Inst. 301; Paine's case, 8 Rep. 36 (a).

(*b*) Co. Litt. 30 a. The requisite of "issue" does not exist in lands held in *gavelkind*.

(*c*) See Rennington *v.* Cole, Noy, 29.

(*d*) Co. Litt. 31 a, 29 a.

(*e*) 2 Bl. Com. 127.

other hand, her estate may be either legal or equitable (*f*). 3. The issue must be born alive. [Some have had a notion that it must be heard to cry, but that is a mistake. Crying, indeed, is the strongest evidence of its being born alive: but it is not the only evidence (*g*). The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while yet in the mother's womb; and the estate being once so vested, shall not afterwards be taken from it (*h*). The issue must also be such as is capable of inheriting the mother's estate (*i*). Therefore, if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male (*h*). The time when the issue was born is immaterial, provided it were during the coverture; for whether it were born before or after the wife's seisin of the lands, and whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy (*h*). The husband by the birth of the child becomes, as was before observed, tenant by the curtesy *initiate*, and may do many acts to charge the lands (*k*); but his estate is not *consummate* till, 4. The death of the wife, which is the last requisite to make a complete tenant by the curtesy (*l*).]

To complete our view of this species of interest, it must be added that by the 40 & 41 Vict. c. 18 (an Act passed chiefly in reference to estates held under a *settlement*), a

(*f*) See Watts *v.* Ball, 1 P. Wms. 108; Casborne *v.* Scarfe, 1 Atk. 603; Moore *v.* Webster, Law Rep., 3 Eq. Ca. 267; Appleton *v.* Rowley, ib. 8 Eq. Ca. 139.

Dyer, 25; Paine's case, 8 Rep. 34.

(*h*) Co. Litt. 29 b.

(*i*) Litt. s. 52.

(*k*) Co. Litt. 30 a.

(*l*) Ibid.; see Jones *v.* Davies, *per cur.*, 5 H. & N. p. 779.

power, though subjected to certain restrictions, is conferred upon tenants by the curtesy to demise for twenty-one years the lands which they hold under that title; and such leases will consequently be good as against those in remainder (*m*).

IV. Another estate for life, is the estate *in dower*, that is to say, the estate which, by the common law, a woman, on the death of her husband, has, for the term of her natural life, in a portion of his lands and tenements (*n*). This portion amounts to the third part in value of such lands and tenements; except the amount be otherwise by particular custom; as in gavelkind, whereby she is entitled to a moiety; but subject, in this instance, to the condition of remaining chaste and unmarried. And by the custom of some places she is entitled to claim the whole; and in others, again, only a quarter (*o*).

[Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos:* which among the Romans signified the marriage portion which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there anything in general more different than the regulation of landed property, according to the English and Roman laws. Some have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures (*p*); though we cannot expect any feudal reason for its invention, since it was not a part of the pure,

(*m*) 40 & 41 Vict. c. 18, s. 46. But this provision does not include the principal mansion house and demesnes. (Ib.)

(*n*) As to dower, see Co. Litt. 30 b—41 a; Rowe *v.* Bower, 2 N. R. 1; Slatter *v.* Slatter, 1 Scott, 82; Colleton *v.* Gareb, 6 Simon, 19; Stoughton *v.* Leigh, 1 Taunt. 402; Ray *v.* Pung, 5 B. & Ald. 561; Moody *v.* King, 2 Bing. 447; Rex *v.* Northweald Bassett, 4 Dow. & Ry. 276; Jones *v.* Jones, 2 Tyrw. 531.

(*o*) 2 Bl. Com. 129; Robinson on Gavelkind, bk. ii. c. 2.

(*p*) Wright's Ten. 192.

[primitive, simple law of feuds, but was first of all introduced into that system, (wherein it is called *triens*, *tertia*, and *dotalitium*,) by the Emperor Frederick the second, who was contemporary with our King Henry the third (*q*). It is possible, therefore, that it might be with us the relic of a Danish custom; since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals (*r*). However this may be, the reason which our law gives for adopting it, is a very plain and sensible one: viz., for the sustenance of the wife, and the nurture and education of the younger children (*s*).

In treating of this estate, let us first consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred*, or otherwise defeated.]

1. And, first, the dowager must be the actual wife of him under whom she claims at the time of his decease. If there have been a dissolution of the marriage (or, as it was formerly called, a divorce *a vinculo matrimonii*), she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (*t*). But a divorce *a mensâ et thoro* (or, as we should now say, a judicial separation) did not, by our common law, destroy the dower, not even though decreed for adultery itself (*u*). [Yet by the statute of West-

(*q*) Craig, l. 2, t. 22, s. 9.

(*r*) Mod. Un. Hist. xxxii. 91.

(*s*) Bract. l. 2, c. 39, s. 1; Co. Litt. 30 b.

(*t*) Bract. ib. s. 4. But she did not lose her dower merely because the marriage was *voidable*, if there was no actual divorce; (Co. Litt. 33 a.) Nor by reason of her having been married under the age of twelve, or to a husband under the age of fourteen; provided (says Blackstone, vol. 2, p. 131), she be above nine years old at her husband's death. In Bracton's time the age was indefinite, and dower arose *si uxor possit dotem promereri, et virum sustinere*. (Ib. s. 3.)

(*u*) Co. Litt. 33 a, 33 b; Sidney *v.* Sidney, 3 P. Wms. 276. On

[minster the second (13 Edw. I. st. 1, c. 34), if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her (*x*). By the antient law, the wife of a person attainted could not be endowed; to the intent, says Staunforde, that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may (*y*): though Britton gives it another turn, viz., that it is presumed the wife was privy to her husband's crime (*z*). However, the statute 1 Edw. VI. c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower. But a subsequent statute (5 & 6 Edw. VI. c. 11, s. 13) revived this severity against the widows of attainted *traitors*, and barred them of their dower, but not the widows of attainted *felons* (*a*).

2. We are next to inquire, of *what* a widow may be endowed. And supposing no act to have been done to defeat or abridge her rights, she is by law entitled to be endowed of all lands and tenements of which her husband was seised in fee simple or in fee tail at any time during the coverture, and of which any issue, which she might have had, might by possibility have been heir (*b*). Therefore, if a man seised in fee simple hath a son by his first wife, and after marries a second wife, she shall be endowed

the other hand, among the antient Goths, an adulteress was punished by the loss *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. l. 3, c. 2.)

(*x*) 2 Inst. 435; see Hetherington *v.* Graham, 6 Bing. 135, and Woodward *v.* Dowse, 10 C. B., N. S. 722.

(*y*) P. C. b. 3, c. 33.

(*z*) C. 110.

(*a*) It is said in our books that an alien woman, married without the royal licence, may not claim dower (Co. Litt. by Harg. 31 b); but as to this see now 33 & 34 Vict. c. 14, s. 10 (1).

(*b*) Litt. ss. 36, 53. To some few possessions of the husband, however, the right to dower does not attach—as a castle built for the defence of the realm, or a common without stint. (See Co. Litt. 316; Gerard *v.* Gerard, 3 Lev. 401.)

[of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body, begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them (*c*). A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable (*d*); for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed (*e*). She may also now claim dower in an estate of inheritance in possession, of which her husband was the *equitable* owner (*f*).

3. Next, as to the *manner* in which a woman is to be endowed. Formerly a woman was sometimes endowed by act of the party. Thus, there was: 1. Dower *ad ostium ecclesiæ* (*g*); which was where tenant in fee simple of full age, openly at the church door, after affiance made, and (Sir Edward Coke in his translation of Littleton adds) troth plighted between them, endowed his wife with the whole, or such quantity as he pleased, of his lands, at the same time specifying and ascertaining the same (*h*); on which the wife, after her husband's death, might enter without further ceremony. And 2. Dower *ex assensu patris*, which was only a species of dower *ad ostium ecclesiæ*, made when the husband's father was alive, and

(*c*) Litt. s. 53.

(*d*) See 3 & 4 Will. 4, c. 105, s. 3.

(*e*) Co. Litt. 31 a; vide sup. p. 265.

(*f*) 3 & 4 Will. 4, c. 105, s. 2.

(*g*) Litt. s. 39.

(*h*) It would seem, however, that, at one time, the husband could not endow his wife *ad ostium* with *more* than one third (vide post, p. 277).

[the son, by his consent expressly given, endowed his wife with parcel of his father's lands (*i*).] But both these descriptions of dower, having been abolished by a modern act of parliament, have now disappeared from our system (*k*). And we need only therefore concern ourselves with a claim of dower *by the common law* or *by particular custom.*

[By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his licence, lest she should contract herself, and so convey part of the feud, to the lord's enemy (*l*). This licence the lords took care to be well paid for, and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But to remedy these oppressions, it was provided by *Magna Charta*, that the widow shall not be distrained to marry afresh, if she chooses to live without a husband (*m*); but shall not however marry against the consent of the lord; and further, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarantine*, a term made use of in law to signify the number of forty days, whether applied to this occasion or any other (*n*). The particular lands to be held in dower must be assigned by the heir of the husband, or his guardian (*o*); not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by his entry

(*i*) Litt. s. 40.

(*k*) 3 & 4 Will. 4, c. 105, s. 13. There was also, formerly, another species of dower, called *de la plus belle*. Of this no more need be said than that it was a consequence of the military tenures, and abolished with them. (2 Bl. Com. p. 132; Co. Litt. 38 a.)

(*l*) Mir. c. 1, s. 3.

(*m*) Cap. 7.

(*n*) For example, it also signifies the forty days which persons coming from infected countries are obliged to wait, before they are permitted to land in

(*o*) Co. Litt. 34 b, 35 a.

[comes tenant thereof to the lord, and the widow is immediate tenant to the heir by a kind of subinfeudation or under-tenancy, completed by this investiture or assignment (*p*): and such tenure may still be created notwithstanding the statute of *Quia emptores*, because the heir parts not with the fee simple, but only with an estate for life. If the heir or his guardian do not assign the widow her dower within the term of quarantine, or do assign it unfairly, she has her remedy by action of dower, and the sheriff is appointed to assign it (*q*). If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds: but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like (*r*).

4. Lastly, we are to inquire how dower may be *barred*, or otherwise defeated. A widow may be barred of her dower not only by elopement and adultery, by divorce, the treason of her husband, and other disabilities before mentioned,—but also by detaining the title-deeds or evidences of the estate from the heir; that is, she will be barred until she restores them (*s*).] She may also lose the right to claim dower by an estate being settled on her at the time of marriage by way of jointure, as regulated by the stat. 27 Hen. VIII. c. 10,—a subject on which some farther explanation may here be desirable.

A *jointure* strictly signifies a joint estate limited to both husband and wife (*t*), and it is thus defined by Sir Edward

(*p*) Gilb. Ten. 173.

(*q*) Co. Litt. 34 b, 35 a. If the heir (being under age), or his guardian, assigned more than she ought to have, this was formerly remedied by *writ of admeasurement of dower*. (See F. N. B. 148; Finch, L. 314; stat. Westm. 2, 13 Edw. 1, c. 7.) But this writ is now abolished.

(*r*) Co. Litt. 32 a.

(*s*) Anne Bedingfield's case, 9 Rep. 15 b.

(*t*) See Dennis's case, Dy. 248 a; Vernon's case, 4 Rep. 3 b; Earl of Buckinghamshire *v.* Drury, 3 Bro. P. C. 492; Duchess of Somerset's case, Dy. 97 b.

Coke (*u*) :—"A competent livelihood of freehold for the "wife, of lands and tenements; to take effect presently, "in possession or profit, after the decease of the husband; "for the life of the wife at least." A description framed from the purview of the stat. 27 Hen. VIII. c. 10, before mentioned, commonly called the Statute of Uses, of which we shall speak fully hereafter. [At present it is sufficient to observe, that before the making of that statute the greatest part of the land of England was conveyed "to uses," the property or possession of the soil being vested in one man, and the *use* or profits thereof in another; whose directions, with regard to the disposition thereof, the former was in conscience and equity obliged to follow, and would be compelled by the courts to observe. Now in such a case, though a husband had the profits conveyed to his use, in absolute fee simple, yet the wife was not entitled to any dower in the lands, he not being *seised* thereof; wherefore it became usual, on marriage, to settle by express deed some special estate *to the use of the husband and his wife, for their lives, in joint-tenancy or jointure;* which settlement would be a provision (in lieu of dower) for the wife in case she survived her husband. But at length the Statute of Uses ordained that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself: and in consequence of such legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure, had not the same statute provided that, upon the husband's making or procuring to be made such an estate in jointure to the wife before marriage, she should be for ever precluded from her dower (*x*). But then these four requisites must be punctually observed.—1. The jointure must be limited to take effect immediately on the death of the

(*u*) Co. Litt. 36 b; see Cresswell *v.* Byron, 3 Bro. C. C. 362.

(*x*) Vernon's case, 4 Rep. 1, 2.

[husband. 2. It must be for the wife's own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and must appear by the deed to be, in satisfaction of her whole dower, and not of any particular part of it (*y*). If the jointure be made to her *after* marriage, she has her election after her husband's death, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during the coverture. And if, by any fraud or accident, a jointure made before marriage, proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then, by the provisions of the same statute, have her dower *pro tanto* at the common law (*z*).

There are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versâ*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower, by the old common law, was subject to no tolls or taxes; and hers was almost the only estate on which, when derived from the king's debtor, the king could not distrain for his debt, if contracted during the coverture (*a*). But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; whereas no small trouble, and a tedious method of proceeding by way of process in the courts, is necessary to compel an assignment of dower (*b*). So, though dower was forfeited by the treason of the husband, or by the wife's elopement and adultery, yet the title to lands settled in jointure remains, in either case, unimpeached (*c*).]

Independently of the bar of dower by way of jointure, if the husband makes any provision for his wife by will or otherwise, in such a manner as clearly to indicate an inten-

See Tinney *v.* Tinney, 3 Atk. 3.

(*z*) See Beard *v.* Nuthall, 1 Vern. 428.

(*a*) Co. Litt. 31 a; F. N. B. 150.

(*b*) Co. Litt. 36 b.

(*c*) Ib. 37 a; Sidney *v.* Sidney, 2 P. Wms. 277.

tion that it shall be taken in lieu of dower, she will be barred by her acceptance, after his death, of the provision so made; but she is allowed her option or election whether she will accept it or not (*d*).

Dower will also be barred if the husband, on acquiring his estate, took the conveyance of the land, in a form properly adapted to that purpose. Of these forms there are several, called *conveyances to uses to bar dower* (*e*); on which it is only necessary to say that they are the contrivance of conveyancers, founded on the Statute of Uses before mentioned, intended to give the husband a clear dominion over the property he purchases, free from future claim on the part of his widow: these forms being so managed as to vest in him the effective ownership, but not precisely such an estate as by the rules of law would be subject to dower.

On the other hand, if the husband neglected, on acquiring an estate subject to dower, to bar his widow's claim by taking a conveyance in the proper form, the wife's right was (up to a late period of our legal history) secure from liability to be defeated by any alienation or devise which he might think fit to make of such estate—her title always remaining paramount; and her concurrence and release of her rights by means of a *fine* (that is, a fictitious suit in the court of common pleas, as will be explained hereafter) was therefore essential to a valid conveyance (*f*). While dower retained its original importance, no just objection could be made to this principle; for though it operated as a clog on the transfer of property, it was evidently essential to the full protection of the widow's right. But at the period to which we refer, that right had long sunk into comparative insignificance, owing, first, to the facility with which it was capable of being barred; secondly, to the great increase in modern times of personal property, out of which the hus-

(*d*) Co. Litt. by Harg. 36 b, n. 1; Thompson *v.* Nelson, 1 Cox, 447; Ayres *v.* Willis, 1 Ves. sen. 230, and see 3 & 4 Will. 4, c. 105, ss. 9, 10.

(*e*) Butler's Fearne, 346—349, 9th ed.

(*f*) As to a fine, vide post, bk. II. pt. I. c. XIX.

band might make ample provision for the wife by way of testamentary disposition, and of which, if he died intestate, she became entitled to her share; and, lastly, to the effect of the Statute of Wills, which, by making real property devisable, empowered him to provide for her by will out of his real estate. Under these circumstances there appeared to be no sufficient reason for continuing the inconvenient restraint which the law of dower tended to impose on the husband's alienation; and consequently by the Dower Act, (3 & 4 Will. IV. c. 105,) it was provided, that all dispositions of his land (whether absolute or partial, and whether by conveyance in his lifetime or by will,) and all debts and incumbrances to which such land might be subject, should be valid and effectual, as against his widow's right to dower (*g*). The same Act also increased the facilities for barring dower; which may now be effected by a simple declaration for that purpose, introduced into the deed by which land is conveyed to a husband, or into any deed executed by him, or into his last will and testament. And it further enacted, that where the husband devises for his wife's benefit any part of his land that had been subject to her dower, she shall be thereby barred unless a contrary intention is declared by the will (*h*): though it is otherwise as to a bequest of personalty, and as to a devise of land on which her claim would not attach; for, in the absence of a declaration to the contrary, such a bequest or devise shall *not* be sufficient to exclude her title as dowress (*i*). It is to be observed, however, that none of the provisions of this Act apply to the case of women married on or before 1st January, 1834; and that as to these the former law of dower consequently remains in its full force.

[It is curious to observe the several revolutions which the doctrine of dower has undergone since its introduc-

See Lacey *v.* Hill, Law Rep., 19 Eq. Ca. 346.

(*h*) See Rowland *v.* Cuthbertson, Law Rep., 8 Eq. Ca. 466.

(*i*) See Chalmers *v.* Storil, 2 Ves. & Bea. 244; Dickson *v.* Robinson, Jacob, 503.

[tion into England. The wife's claim seems first to have extended to a *moiety* of the husband's lands, but to have been forfeitable by incontinency or a second marriage. By the famous charter of Henry the first, this condition of widowhood and chastity, was only required in case the husband left any issue (*k*); and afterwards we hear no more of it. Under Henry the second, according to Glanvil, the dower *ad ostium ecclesiæ* was the most usual species of dower (*l*); and here, as well as in Normandy, it was binding upon the wife, if by her consented to at the time of marriage (*m*). Neither, in those days of feudal rigour, was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he then was seised, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits (*n*). But if no specific dotation was made at the church porch, then she was endowed by the common law of the third part (which was called her *dos rationabilis*) of such lands and tenements as the husband was seised of at the time of the espousals, and no other; unless he especially engaged before the priest to endow her of his future acquisitions (*o*); and, if the husband had no lands, an endowment in goods, chattels or money, at the time of espousals, was a bar of any dower in lands which he afterwards acquired (*p*). In King John's

(*k*) "*Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit; si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.*"—Cart. Hen. 1, A.D. 1101. Introd. to Great Charter, edit. Oxon. p. iv.

(*l*) Glanv. l. 6, c. 1 & 2.

(*m*) Gr. Coustum. c. 101.

(*n*) Bract. l. 2, c. 39, s. 6.

(*o*) *De questo suo* (Glanv. ubi sup.); *de terris acquisitis et acquirendis.* (Bract. ubi sup.)

(*p*) Glanv. ubi sup. When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, "*quod dotat eam de tali manerio cum pertinentiis*, &c."—Bract. ubi sup.); and therefore in the old York ritual, (Seld. Ux. Hebr. l. 2, c. 27,) there is at this part of the matrimonial service, the following rubric: "*sacerdos interroget dotem mulieris; et si terra ei in dotem detur, tunc dicatur*

[Magna Charta, and the first charter of Henry the third (in the year 1216), no mention is made of any alteration of the common law, in respect of the lands subject to dower; but in the charters of 1217 and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime; though in case of a specific endowment of less, *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law during the reigns of Henry the third and Edward the first (*q*). In Henry the fourth's time it was denied to be law, that a woman could be endowed of her husband's goods and chattels (*r*): and, under Edward the fourth, Littleton lays it down expressly, that a woman might be endowed *ad ostium ecclesiæ* with *more* than a third part (*s*); and should have her election, after her husband's death, to accept such dower, or refuse it and betake herself to her dower as at common law (*t*).]

As to the existing law, the reader will have observed, from the account above given, that the right to dower, after falling by several gradations from its original consequence, is at length, in regard to women married after 1st January, 1834, reduced to one of the most precarious description, which the husband may bar or defeat at his

psalmus iste, &c." When the wife was endowed generally ("*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis*"—Bract. l. 2, c. 39, s. 6), the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my worldly goods, (or, as the Salisbury ritual has it, *with all my worldly chattel*,) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis*, of his personal estate; which is provided for by Magna Charta, c. 26. But the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

(*q*) Bract. ubi sup.; Britton, c. 101, 102; Flet. l. 5, c. 23, s. 11, 12.

(*r*) P. 7 Hen. 4, 13, 14.

(*s*) Litt. s. 39; F. N. B. 150.

(*t*) Litt. s. 41.

pleasure; though if he fails to exercise that power, the widow is still in a condition to assert her title against the heir. And to this it may be added that, by 40 & 41 Vict. c. 18, s. 46, a dowress has a right to demise any unsettled estate (under certain restrictions specified in the Act, and with the exception of the principal mansion house and demesne lands) for a term not exceeding twenty-one years, and that a lease so granted will consequently be good against those in remainder, notwithstanding her death.

CHAPTER V.

OF ESTATES LESS THAN FREEHOLD.

HAVING now investigated, in some measure, the nature of freehold estates, we arrive at the consideration of those which are less than freehold, and to which the law consequently applies the denomination of *chattels real* (*a*). For it is to be understood that *chattels* (or *goods and chattels*) is a term used to express any kind of property which, having regard either to the subject-matter, or the quantity of interest therein, is not *freehold* (*b*). The appellation was originally derived from the technical Latin word *catalla*, which, among the Normans, primarily signified only beasts of husbandry, or, as we still call them, *cattle;* but, in a secondary sense, was applicable to all moveables in general, and not only to these, but to whatever was not a *fief* or *feud;* to which, among the Normans, there were two requisites, a given degree of duration as to time, and immobility with regard to place (*c*). And it is in this latter more extended and negative sense that our own law adopts the term, considering as a chattel whatever amounts not to freehold; which, like the Norman fief, requires immobility in respect of the subject-matter, and a given degree of duration, that is, a duration for a life at least, (either absolute or determinable on some contingency,) as regards the quantity of interest or estate (*d*). Any estate

(*a*) Vide sup. p. 167, n. (*a*).
(*b*) Co. Litt. 118 b.
(*c*) 2 Bl. Com. 386.
(*d*) Vide sup. p. 230.

in lands and tenements, which amounts not to freehold, is consequently a chattel; but inasmuch as it concerns, or, according to the technical expression, *savours* of the realty (*e*), it is denominated a chattel *real*, in order to distinguish it from things which have no concern with the realty, viz., mere moveables, and the rights connected with them; and such things as these are, on the other hand, often described as chattels *personal* (*f*).

Chattels of either description are inferior, it is to be observed, in the eye of the law, to freehold; and they form a subordinate class of property, the different species of which are subject, in many respects, to the same incidents; so that as distinguished from estates of inheritance or for life in things real, of whatever tenure, they receive the common denomination of *personal* estate; while these last are on the other hand described as *real* estate (*g*). As to the incidents by which chattels real and personal are allied, it may be remarked, that though "livery of seisin" was a ceremony without which an estate of inheritance or for life in corporeal hereditaments of free tenure could not in general pass at the common law (*h*), it was no more requisite in the transfer of a chattel real, than in that of a chattel personal. Moreover a chattel real belongs, on the death of the owner, to his executor or administrator, like a chattel personal, and does not descend, like a freehold of inheritance, to his heir. So the interest in a chattel real, as in a chattel personal, may be made to commence *in futuro*, which was not in general allowed, at common law, as to the freehold in a corporeal hereditament (*i*). Again, the tenant of a chattel real is not said to be *seised*, like the tenant of a freehold, but to be *possessed* only, as if

(*e*) Co. Litt. 118 b.

(*f*) 2 Bl. Com. p. 387.

(*g*) Ib. 386; vide sup. p. 167, n.

(*h*) This rule of the common law, is now altered by 8 & 9 Vict. c. 106, s. 2, as to which vide post, c. XVII.

(*i*) But a freehold interest might be made to commence *in futuro* by way of *remainder*; vide post, pp. 320, 321.

it were a chattel personal. And, lastly, we may observe, there can be no estate tail in a chattel real, any more than in a chattel personal, but only in a freehold (*k*).

Of estates that are less than freehold, there are three sorts: I. Estates for years; II. Estates at will; III. Estates by sufferance.

I. An estate for *years* is where a man has an interest in lands and tenements, and a possession thereof by virtue of such interest, for some fixed and determinate period of time (*l*); as in the case where lands are let for the term of a certain number of years, agreed upon between the lessor and the lessee (*m*), and the lessee enters thereon (*n*); and this amounts but to a chattel real, however long the period of time for which the lands are demised; for, in contemplation of law, no interest for a certain and determinate period of time,—even for 1,000 years,—is as large as an estate for life, which, as we have seen, is the lowest description of freehold (*o*).

[Though the lease be but for half a year, or a quarter, or any less time, the lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term of which the law in this case takes notice (*p*). And this may, not improperly, lead us into a short digression concerning the division and calculation of time by the English law.

(*k*) 2 Bl. Com. 398.

(*l*) As to this estate, see Co. Litt. 43 b—54 b.

(*m*) We may here remark, once for all, that the terminations "—or" and "—ee" obtain, in law, the one an active, the other a passive signification: the former usually denoting the doer of an act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth land in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee.—Litt. s. 57.

(*n*) Ib. s. 58.

(*o*) Co. Litt. 46 a.

(*p*) Litt. s. 67.

[The space of a year is a determinate and well-known period, consisting commonly of 365 days; for, though in bissextile or leap-years it consists properly of 366, yet by the stat. 40 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous; there being, in common use, two ways of calculating months, either as *lunar*, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as *calendar* months of unequal lengths, according to the Julian division in our common almanacks, commencing at the calends, that is to say on the first day of each month, whereof in a year there are only twelve.] By the old common law, a "month" used to be, in matters temporal, a lunar month, or twenty-eight days; in matters ecclesiastical, a calendar month (*q*): though this was a rule of the most general description, and yielded easily to exception where custom or the obvious meaning of parties in the particular transaction, or any other special consideration, made it reasonable to depart from the usual construction of the term month (*r*); *e. g.*, if money were lent for three months, these should be intended calendar months, whether a bill of exchange or a promissory note timed to mature with the three months was given or not (*s*); also, in all statutes, a month means a calendar month (*t*). [The ordinary rule, however, applies to the case of a lease; and consequently, a lease for "twelve months" is only for forty-eight weeks. But where the lease was for "*a* twelvemonth," in the singular number, it was held to be good for the whole year; for herein the law recedes from

(*q*) See Lacon *v.* Hooper, 6 T. R. 226; Blunt *v.* Heslop, 3 Nev. & Per. 553; Simpson *v.* Margitson, 11 Q. B. 23.

(*r*) Davy *v.* Salter, 3 Salk. 346; Rex *v.* Cussons, 1 Sid. 186; Hipwell *v.* Knight, 1 Y. & Col. 401. A modern Act, moreover (13 & 14 Vict. c. 21), enacts, that in all *statutes* "the word 'month' shall be deemed and taken to mean 'calendar' month, unless words be added showing lunar month to be intended."

(*s*) Str. 446.

(*t*) 13 & 14 Vict. c. 21.

[its usual calculation, because the ambiguity between the two methods of computation ceases,—it being generally understood, that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution (*u*).] In the space of a day all the twenty-four hours are usually reckoned (*x*). Therefore if I am bound to pay money on any certain day, I discharge the obligation (as the general rule) if I pay it any time before twelve o'clock at night, after which the following day commences (*y*). And it is also a principle (though one from which it is often necessary, for the sake of justice, to deviate) that, with a view to convenience, the law will consider the ordinary periods of time without regard to their fractional parts (*z*). Thus half a year consists of 182 days, and a quarter of a year of 91; the remaining hours being in either case rejected (*a*). But to return to estates for years.

[These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own (*b*). And therefore they were not allowed to have a freehold estate; but their interest, such as it was, vested after their deaths in their representatives, who were to make

(*u*) See Catesby's case, 6 Rep. 62 a.

(*x*) 2 Bl. Com. p. 141; Co. Litt. 135 a; Maund's case, 7 Rep. 28 b; Duppa *v.* Mayo, 1 Saund. 287; Burbridge *v.* Manners, 3 Camp. 194.

(*y*) Bl. Com. ubi sup.; and see 43 & 44 Vict. c. 9 (Greenwich time).

(*z*) See Wright *v.* Mills, 4 H. & N. 488.

(*a*) Co. Litt. 135 b; Bishop of Peterborough *v.* Catesby, Cro. Jac. 167; Yelv. 100; Dy. 345 a.

(*b*) Bac. Ab. Leases.

[up the accounts of the deceased with the lord and the other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, at one period of the antient law, be at any time defeated by a collusive recovery suffered by the tenant of the freehold, in an action brought against him for the purpose (*c*).

So long as estates for years were thus precarious, it is no wonder that they were usually short, like our modern leases upon rack-rent; and indeed we are told that by the antient law no leases for more than forty years were allowable: because any longer possession, especially when given without any livery declaring the nature and duration of the estate, might tend to defeat the inheritance (*d*). Yet this law, if ever it existed, was soon antiquated; for we may observe, in Madox's collection of antient instruments, some leases for years of a pretty early date which considerably exceed that period (*e*); and long terms—for three hundred years or a thousand—were certainly in use in the time of Edward the third (*f*), and probably of Edward the first (*g*). At all events, when by the stat. 21 Hen. VIII. c. 15, the termor (that is, he who is entitled to the term of years) was protected against fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and such were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages (*h*).

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *ter-*

(*c*) Co. Litt. 46 a; 2 Inst. 321; Flower *v.* Rigden, Cro. Eliz. 284; Pledgard *v.* Lake, ib. 718; Hist. Eng. Law, by Reeves, vol. iv. p. 232. As to a recovery, vide post, bk. II. pt. I. c. XXI.

(*d*) Mirrour, c. 2, s. 27; Co. Litt. 45 b, 46 a.

(*e*) See Madox, Formulare Anglican. No. 239, fol. 140; ib. No. 245, fol. 146; ib. No. 248, fol. 148, &c.

(*f*) 32 Ass. pl. 6; Bro. Abr. t. Mordauncestor, 42; Spoliation, 6.

(*g*) Stat. of Mortmain, 7 Edw. 1.

(*h*) See Ascough's case, 9 Rep. 135; Brediman's case, 6 Rep. 57.

[*minus*, because its duration or continuance is bounded, limited and determined; for every such estate must have a certain beginning and certain end (*i*). But *id certum est, quod certum reddi potest:* therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years (*k*); for though it is at present uncertain, yet, when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making or delivery of the lease (*l*). A lease for so many years as J. S. shall live, is (regarded as a mere term) void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease (*m*). And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he shall so long continue parson of Dale, is good; for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there (*n*).

As already observed, the word *term*, when applied to this description of estate, signifies the estate itself which the grant confers, and not merely the period of time specified in the grant; and therefore the term may expire during the continuance of the time; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years, and after the expiration of the said term to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect; but if the remainder be to B. from and after the expiration of the said "three years," or from and after the expiration of the said "time," in this case B.'s interest will not commence till

(*i*) Co. Litt. 45 b.

(*k*) Bishop of Bath's case, 6 Rep. 35 b.

(*l*) Co. Litt. 46 b; and see Doe *v.* Benjamin, 9 Ad. & El. 644; Marshall *v.* Berridge, 19 Ch. Div. 233.

(*m*) Co. Litt. 45 b.

(*n*) Ibid.

[the time is fully elapsed, whatever may become of A.'s term (*o*).]

As an estate for years was not created at common law, like a freehold, by livery of seisin, so the tenant, in proper technical language, is not said to be *seised*, but to be *possessed*. Neither for the creation of this estate is it proper to limit it to a man and his "heirs," as in the case of a freehold of inheritance. The correct limitation is to a man and to his "executors and administrators;" though it is sufficient if it be granted to himself only, without mention of his personal representatives; for in these, on his death, the law will vest it without any special words of limitation.

Again, as it required no livery of seisin, so at common law this estate, for whatever length of duration, might be constituted by mere agreement, verbal or written, if followed up by the entry of the lessee. But by the Statute of Frauds, (29 Car. II. c. 3,) it was enacted that no lease for more than three years, or at a lower rent than two-thirds of the improved value of the thing demised, should be effectual, unless put into writing and signed by the party demising or his agent thereunto lawfully authorized by writing (*p*). And by 8 & 9 Vict. c. 106, s. 3, it has been further provided, that a lease required to be in writing, (if made after the 1st of October, 1845,) shall be void at law unless not only reduced to writing, but also made *by deed* (*q*).

It is also to be remarked, that the bare demise does not in itself vest a complete estate for term of years, in the lessee: it only gives him a right of entry on the tenement; which right is called his "interest in the term," or *interesse termini*. And when he has actually so entered, the estate is then, and not before, completely vested in him. How-

(*o*) Ibid.

(*p*) 29 Car. 2, c. 3, ss. 1, 2. See Edge *v.* Strafford, 1 Tyrw. 295; Lord Bolton *v.* Tomlin, 5 Ad. & El. 856.

(*q*) As to the effect of this enactment, vide post, c. XVII.

ever, the *interesse termini* is so far in the nature of an estate, that, even before entry, the lessee may grant his interest over to another; though, on the other hand, a lessee is not before entry in a condition to maintain an action of trespass for an injury to the land (*r*).

[Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers which we formerly observed that tenant for life was entitled to (*s*); that is to say, house-bote, fire-bote, plough-bote, hay-bote (*t*), and the like; and the doctrine of *waste*, also, applies generally to tenants for years (*u*).]

With regard to emblements, that is, the profits of lands sowed, a tenant for years is entitled to them in some cases, but not in all. For where his term depends upon a certainty, as if he holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and out before Midsummer, the landlord shall have it, in the absence of any special contract or custom to the contrary; for the tenant knew the expiration of his term, and therefore it was his own folly to sow that of which he never could reap the profits (*x*). But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determinable upon a life or lives (*y*): in these

(*r*) 2 Bl. Com. 144; Plowd. 198. See Doe *v.* Walker, 5 Barn. & Cress. 111; Co. Litt. 338 a, 270 a; Neal *v.* Mackenzie, 1 Mee. & Wels. 747; Williams *v.* Bosanquet, 1 Brod. & Bing. 248; Edge *v.* Strafford, 1 Tyrw. 295.

(*s*) Vide sup. p. 256.

(*t*) Co. Litt. 41 b.

(*u*) As to waste, vide sup. p. 257, et post, bk. v. c. VIII. Some doubt has been entertained as to the liability of tenant for years (in the absence of express stipulation) for *permissive* waste; but see Yellowly *v.* Gower, 11 Exch. pp. 273, 274.

(*x*) 2 Bl. Com. p. 145; Litt. s. 68.

(*y*) But it may be remarked that a lease for years by a tenant for life, or a husband seised in right of his wife, is not in *all cases* now subject to uncertainty. For by 40 & 41 Vict. c. 18, s. 46, such persons may now, under such circumstances as therein mentioned, make effectual leases for any term not exceeding twenty-one years. Vide sup. pp. 258, 266, 267, 279.

and similar cases, the estate for years not being certainly to expire at a time foreknown, but by the act of God,—the tenant for years, or his representatives, shall have the emblements in the same manner that a tenant for life, or his representatives, are entitled thereto (*z*). But it is otherwise if the term determine by the act of the party himself; as if he does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default (*a*). The operation of the common law right to emblements, however, is now much more limited than it once was, having ceased (as we have seen), by the effect of 14 & 15 Vict. c. 25, to apply to such tenants as hold at a rack rent under a landlord entitled for life or any other uncertain interest, and whose lease or tenancy determines by the death of their landlord, or by the cesser of his estate; and a protection of a different kind—that is to say, a continuing of their holding till the end of the current year—being now provided for tenants so circumstanced (*b*).

The tenancy "from year to year," or "by the year" (a very common species of the estate for years), may be created, in the first place, by the express agreement of the parties (*c*); and this (provided the rent reserved be two-thirds at the least of the annual value of that which is demised) may be either verbal or in writing; but if the rent be under that amount, then it must be *by deed* (*d*). It may also be created, secondly, by construction of law (*d*). Thus, if a man demise premises to another at

(*z*) 2 Bl. Com. p. 145.

(*a*) Co. Litt. 55 b.

(*b*) Vide sup. p. 260.

(*c*) So also the tenancy may be for a *less* period than a year, as from "month to month," or "week to week," and the like, according to the agreement of the parties. Such tenancies, also, can only be determined by reasonable notice; but what notice is reasonable in such cases does not appear to have been expressly determined. (See Jones *v.* Mills, 10 C. B., N. S. 800.)

(*d*) Vide sup. p. 287.

a yearly rent, no length of time being expressed, the law will construe this as a demise from year to year (*e*). So the law will always imply a tenancy from year to year where there is an occupation at an annual rent, and there is no evidence that the occupier's estate is of a different description (*f*). And if a man was let into possession under a demise not under seal, for a term of more than three years, though such a demise would not (as we have seen) pass any legal interest in the premises for the term specified (*g*), yet the lessee was considered as holding from year to year, and on such of the terms of the agreement as were consistent with that tenancy (*h*); but, at the present day, such a demise (being good in equity as an agreement to demise) confers an equitable interest in the term (*i*), and not merely a legal interest from year to year.

It is to be observed that where a tenancy "by the year" or "from year to year" is once created it cannot, on either side, be put an end to without half a year's *notice to quit* from one party to the other, such notice expiring with the current year of the tenancy (*k*); though if the tenancy commenced at one of the usual quarterly feast days, the half year may be computed from one of such feast days to another—as from Midsummer to Christmas—whether there be 182 days between them or not (*l*).

(*e*) See Doe *v.* Donavan, 1 Taunt. 555; Richardson *v.* Langridge, 4 Taunt. 128; Wilkinson *v.* Hall, 3 Bing. N. C. 508.

(*f*) See Doe *d.* Lord *v.* Crago, 6 C. B. 90.

(*g*) Vide sup. p. 287.

(*h*) See Lee *v.* Smith, 9 Exch. 662; Tress *v.* Savage, 4 Ell. & Bl. 36, 42.

(*i*) Walsh *v.* Lonsdale, 21 Ch. D. 9.

(*k*) See Timmins *v.* Rawlinson, 3 Burr. 1603; Right *v.* Darby, 1 T. R. 159; Doe *v.* Smith, 5 Ad. & El. 351; Doe *v.* Stanion, 1 Mee. & Wels. 691. Blackstone (vol. ii. p. 147) remarks that this kind of lease requiring half a year's notice to determine it, was in use so long ago as the reign of Henry the eighth.

(*l*) Doe *v.* Watkins, 7 East, 551; Roe *v.* Doe, 6 Bing. 574. It may be here remarked that in *farm* leases coming within the Agricultural Holdings Act, 1875, a *year's* notice expiring with the current year of the tenancy is now made necessary (38 & 39 Vict. c. 92, s. 51).

It will follow from what has been above stated that a lease "from year to year" will necessarily confer an estate for one year certain, at the outset (*m*); and if in that or any succeeding year of the tenancy, more than half a year should elapse without a notice to quit being given by either of the parties, another year certain is thereby constantly added to that which is in progress (*n*). Upon the same principle, if the lease be "*for a year*, and so from year to year," it will enure as a demise for *two years* certain, at the outset; for at the expiration of the first there is a continuation of the tenancy, which cannot be determined by a notice to quit at an earlier period than the expiration of the second year (*o*). But in other respects the law of duration is the same as in the case first supposed. It is further to be remarked, that the estate from year to year, when once constituted, does not determine by an assignment of the interest of either of the parties, or by their death: but the tenancy will continue to exist between one of the parties and the assigns or representatives of the other; or between the assigns or representatives of both parties, (as the case may be,) until duly determined by the usual notice to quit (*p*). To which it may be added (with respect to waste) that in the case of a yearly tenancy, where the demise comprises a house, the tenant seems bound to keep it in weather-tight condition, and consequently to be answerable for such permissive waste as may arise by his neglect to do so (*q*).

(*m*) See Doe *d.* Hogg *v.* Taylor, 1 Jur. 960; Doe *d.* Cornwall *v.* Matthews, 11 C. B. 675.

(*n*) As to the manner of proving a notice to quit in writing, see Doe *v.* Somerton, 7 Q. B. 58; Stapylton *v.* Clough, 2 Ell. & Bl. 983. As to the sufficiency of a notice to quit as given in particular cases, see Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143; Doe *d.* Bailey *v.* Foster, 3 C. B. 315.

(*o*) Denn *v.* Cartwright, 4 East, 32.

(*p*) See Maddon *v.* White, 2 T. R. 159; Doe *v.* Porter, 3 T. R. 13; Buckworth *v.* Simpson, 5 Tyr. 354.

(*q*) See 2 Esp. N. C. 590; Auworth *v.* Johnson, 5 Car. & P. 241; Yellowly *v.* Gower, 11 Exch. 274.

II. The second species of estates not freehold, are estates *at will* (*r*). An estate at will, is where lands and tenements are let by one man to another to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession (*s*). It may be constituted by written or verbal agreement without further ceremony, if followed by entry; and may in some cases arise by mere construction of law. [Tenant at will hath no certain indefeasible estate; nothing that can be assigned by him to any other: because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connexion with the other, at his own pleasure (*t*). Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord, before the corn is ripe or before it is reaped, puts him out: yet the tenant shall have the emblements; and free ingress, egress, and regress to cut and carry them away (*u*). And this for the same reason upon which all the cases of emblements turn, viz. the point of uncertainty, since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land (*x*).]

The liability of a tenant at will, in regard to waste of the voluntary kind, is similar to that of tenant for years (*y*); but he is understood to be not liable for waste merely permissive (*z*).

(*r*) As to an estate at will, see Co. Litt. 55 a—57 b.
(*s*) Litt. s. 68.
(*t*) Co. Litt. 55 a—57 b.
(*u*) Ib. 56 a.
(*x*) Ib. 55 b.
(*y*) Ib. 57. Vide sup. pp. 257, 288.
(*z*) See Harnett *v.* Maitland, 16 Mee. & W. 257.

[What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now settled, that not only the express determination of the lessor's will (as by notice given to the lessee that he shall hold no longer), but also the exertion of any act of ownership by the lessor, without the lessee's consent, puts an end to the estate at will (*a*); as, for example, the landlord's entering upon the land and cutting timber, or carrying away stone (*b*), or taking a distress for rent and impounding it on the premises (*c*). And the same consequence will follow if the lessee should commit waste (*d*), or do any act of desertion, such as assigning the estate, which is inconsistent with his tenure. Also, which is *instar omnium*, should either the lessor or the lessee die or be outlawed (*e*).

The law, however, is careful that no sudden determination of the will by one party, shall tend to the manifest and unforeseen prejudice of the other. This appears in the rule as to emblements before mentioned; and, by parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils (*f*). And if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year (*g*). Moreover, upon the same principle, courts of law have leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will (*h*); but have rather held them to be *tenancies from year to year so long as both parties please*—a species of estate which we have already noticed.]

(*a*) See Co. Litt. 57; Henchman *v.* Iles, 1 Ventr. 248.

(*b*) See Co. Litt. ubi sup.; Turner *v.* Doe *d.* Bennett, 9 M. & W. 643.

(*c*) Co. Litt. 57 b.

(*d*) Ib. 57 a.

(*e*) Oland's case, 5 Rep. 116 b; Co. Litt. 57 b, 62 b.

(*f*) Litt. s. 69.

(*g*) Leighton *v.* Theed, 2 Salk. 414; Kighly *v.* Bulkly, 1 Sid. 339.

(*h*) But a demise, wherein the intention of the parties is evidently to create a tenancy by will, is still so construed by the courts. (See Doe *v.* Cox, 11 Q. B. 122.)

III. An estate at *sufferance* is where one comes into possession under a lawful demise, and, after such demise is ended, nevertheless continues the possession (*i*). [As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises, without any fresh lease from the owner of the estate. Or, if a man maketh a lease at will, and die, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance (*k*). But no man can be tenant at sufferance under the king, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by the law; but his tenant, so holding over, is considered as an absolute intruder (*l*). And in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant (*m*); but, before entry, he cannot maintain an action of trespass against him, as he might against a stranger (*n*); and the reason is, because the tenant being once in by a lawful title, the law, (which presumes no wrong in any man,) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act—such as entry—will declare the continuance to be tortious, or, in common language, wrongful.]

We may conclude the present chapter with this remark, that in the case of a lease for years, as well as in that of a lease for life, or gift in tail, a tenure of the imperfect kind is created between the lessor and the lessee (*o*); and the latter holds of the former by the nominal obligation of fealty, and by such services as are reserved; but that it is otherwise as to a tenant at will or at sufferance, from neither

(*i*) Co. Litt. 57 b, 271 a; 2 Inst. 134.

(*k*) Co. Litt. 57 b.

(*l*) Co. Litt. ubi sup.; and see n. (4), by Harg.

(*m*) But such entry must be *peaceable*. As to the nature of the remedy by way of entry, vide post, bk v. c. 1.

(*n*) Trevellian *v.* Andrew, 5 Mod. 384.

(*o*) Vide sup. p. 247.

of whom is any fealty due. The reason assigned as to the tenant at will, is, that "he hath not any sure estate" (*p*); and as to the tenant at sufferance, he is not considered, in strictness, as having any estate at all, but a mere "possession without privity" (*q*).

(*p*) Co. Litt. 93 a, 93 b; 63 a, 68 b, n. (5), by Harg.; see Denn *v.* Fearnside, 1 Wils. 176. There is an exception to this, however, in the case of copyhold, which is a species of estate at will; for fealty is due from a copyholder (though *respited* as of course) on his admittance. (Co. Litt. ubi sup.)

(*q*) Ib. 270 b.

CHAPTER VI.

OF ESTATES UPON CONDITION.

[BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition* (*a*); being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated (*b*). And these conditional estates have been reserved till now, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest—a fee, a freehold, or a term of years—may depend upon these provisional restrictions. These estates, thus understood, are either upon condition implied in law, or upon condition expressed in the grant itself.

Estates upon condition *implied* are where a grant of an estate has a condition annexed to it by the law, inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an "office" generally, without adding other words, the law tacitly annexes thereto a secret condition, that the grantee shall duly execute his office (*c*); on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person (*d*). "Fran-

(*a*) As to this estate, vide Co. Litt. 201 a—237 a.

(*b*) Ib.; Lord Stafford's case, 8 Rep 73 b.

(*c*) Litt. s. 378; see Bartlett *v.* Downes, 3 Barn. & Cress. 619.

(*d*) Litt. s. 317.

[chises," also, or regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect (*e*).

Upon the same principle proceed all the forfeitures of life estates and others for acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenant for life or years should enfeoff a stranger in fee simple: this, *by the common law*, as we shall see presently, was a forfeiture of his estate; being a breach of the condition which the law annexes thereto, viz. that he should not attempt to create a greater estate than he himself was entitled to (*f*).]

An estate on condition *expressed* in the grant itself is where an estate is granted—either in fee simple or otherwise—with an expressed qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated upon performance or breach of such qualification or condition (*g*). And these conditions (described in the books as conditions in *deed*) are either "precedent," that is such as must happen or be performed before the estate can vest or be enlarged; or "subsequent," that is such as by the failure or nonperformance of which, an estate already vested may be defeated. [Thus, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this is a condition precedent, and the fee simple passeth not till the hundred marks be paid (*h*). But if a man grant an

(*e*) Earl of Shrewsbury's case, 9 Rep. 50. As to franchises, vide post, c. XXIII.

(*f*) Vide post, pp. 315—316.

(*g*) Co. Litt. 201 a. As to the commencement of estates upon condition, see Co. Litt. 216 a—218 b; as to their enlargement on condition, Lord Stafford's case, 8 Rep. 11; Fearne, by Butler, 279, 9th ed.; as to their defeasance on condition, Co. Litt. 214 b, 215 a. As to estates *devised* on condition, Sugden on Powers, vol. i. p. 122 (7th ed.).

(*h*) Co. Litt. 217 b; Lord Stafford's case, 8 Rep. 73 b.

[estate in fee simple, reserving to himself and his heirs a certain rent, and that, if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent; and such estate is defeasible, if the condition be not strictly performed (*i*).]

Besides these estates on condition subsequent, there are also estates created by way of *conditional limitation* (*k*); that is to say, where an estate is so expressly defined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail. To this class may be referred all base fees, and fees simple conditional at the common law (*l*). [Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate in fee on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted to a man and the heirs of his body; as this is no tenement within the statute of Westminster the Second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body (*m*). Upon the same principle depend all the determinable estates of freehold, already mentioned: as *durante viduitate*, &c.: these are (in effect) estates for life upon condition that the grantees do not marry, and the like (*n*).

(*i*) Litt. s. 325.

(*k*) Co. Litt. 234 b; see Mary Portington's case, 10 Rep. 40 b, 41 b. The term used by Lord Coke is simply "a limitation." But as "limitation" is ordinarily used to express a more general idea (viz. the definition or circumscription in any conveyance, of the interest which the grantee is intended to take), the term "conditional limitation" better expresses the idea in the text, and is frequently adopted for that purpose (as in 1 Sand. Uses, 149, 2nd ed.). It is right, however, to apprise the student that this term is used by different writers in different senses; see 1 Sand. Uses, 149, 2nd ed.; Fearne, by Butler, 10, n. (*h*), 9th ed.; Gilb. Uses, by Sugd. 178.

(*l*) Vide sup. pp. 239, 240.

(*m*) As to what is a "tenement," vide sup. pp. 169, 170: as to the effect of the statute of 13 Edw. 1, *De donis conditionalibus*, referred to in the text, vide sup. p. 243.

(*n*) Vide sup. p. 255.

[There is a considerable resemblance between conditional limitations and estates depending on conditions subsequent; but there is this difference—that in the former (as when land is granted to a man, *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like,) the estate determines as soon as the contingency happens; and the estate in remainder, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy;—but, in the latter, when an estate is strictly speaking upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.*, by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.,) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition, and make an entry in order to avoid the estate (*o*).] As to the necessity of entry, however, in such case, there is a diversity (says Lord Coke) between a condition annexed to a freehold and a condition annexed to a lease for years (*p*). Thus, if a lease for years be made on condition that, if the lessee goes not to Rome before such a day the lease shall be void, the lease is *ipso facto* void upon the breach of the condition, without any entry by the lessor; but if the lease had been for life, an entry would have been necessary before it could have been defeated (*q*).

The right of entry on breach of a condition subsequent, could not be reserved in favour of a stranger, but only of the grantor or his heirs; and the effect of entry by him or

(*o*) Litt. s. 347, 331; stat. 32 Hen. 8, c. 34; Mary Portington's case, 10 Rep. 40 b, 41 b; Avelyn *v.* Ward, 1 Ves. sen. 420. As to the party on whom lies the *onus probandi* with respect to the breach of the condition, see Brooke *v.* Spong, 15 Mee. & W. 153.

(*p*) As to re-entry by a lessor on breach of condition, see Roberts *v.* Davey, 4 Barn. & Adol. 664; Hill *v.* Kempshall, 7 C. B. 975.

(*q*) Co. Litt. 214 b. As to the nature of the entry required, see Doe *v.* Pritchard, 5 Barn. & Adol. 765.

them, after breach, was to defeat altogether the estate, which had before passed to the grantee; so that the grantor or his heirs were *in* as of their former seisin (*r*). It was also the rule of the common law, that the right of entry on breach could not be assigned in any case to a stranger (*s*). So that if a man had made a lease for life, reserving a rent, with proviso for re-entry in case of non-payment, and the lessor granted over his reversionary estate to another, the latter could take no benefit from the condition (*t*). But by statute 32 Hen. VIII. c. 34 (*u*), the law in this respect is altered, and the grantee of the reversion, upon a lease for life or years, shall have the same benefit of a condition, in case of a subsequent breach, as the grantor himself would have had,—provided that such condition relates to the payment of rent, the restriction from waste, or other like object tending to the benefit of the reversionary interest (*x*). And with respect to *conditional limitations*, a stranger may in all cases take advantage of these, even without the aid of the statute. Thus, if a man make a lease until J. S. shall return from Rome, and afterwards grant the reversion over to another, such grantee, on the return of J. S. from Rome, shall be entitled to enter,—the interest of the lessee being then determined by the terms of the limitation itself (*y*).

[In all instances of estates upon express condition, it is to be observed, that so long as the condition remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed

(*r*) Fearne, by Butler, 381, n. (*a*), 9th ed. As to the rights of the grantor or his heirs on re-entry, in respect of the *emblements*, see Davis *v.* Eyton, 7 Bing. 154.

(*s*) Litt. s. 347.

(*t*) Co. Litt. 215 a.

(*u*) As to this statute, see Thursby *v.* Plant, 1 Saund. by Wms. 237, and the notes thereto; Buckworth *v.* Simpson, 5 Tyrw. 354; Standen *v.* Chrismas and another, 10 Q. B. 135; Wright *v.* Burroughes, 3 C. B. 685.

(*x*) Co. Litt. 205 b; 1 Saund. by Wms. 287, n. (16). And see also the statutes 22 & 23 Vict. c. 35, and 44 & 45 Vict. c. 41.

(*y*) Co. Litt. 214 b; Mary Portington's case, 10 Rep. 42.

[be in itself of a freehold nature: as if the original grant express either an estate of inheritance or for life; or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold, because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken (*a*). But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A., B. and C., or the survivor of them, shall so long live,) this still continues a mere chattel, and is not by reason of such its uncertainty ranked among estates of freehold.

These express conditions are void if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the grantor himself; or if they *be contrary to law*, or *repugnant* to the nature of the estate. In any of which cases, if they be conditions *subsequent*, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day, (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he alienes in fee; that then and in any of such cases the estate shall be vacated and determined: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal or repugnant (*b*). But if the condition be *precedent* or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome

(*a*) Co. Litt. 42 a.

(*b*) Ib. 206 a; Mary Portington's case, 10 Rep. 42; Doe *v.* Eyre, 5 C. B. 744; Clifford *v.* Watts, Law Rep., 5 C. P. 577.

[in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed (*c*).]

On the other hand, even where the condition is valid and capable of being enforced, it is also capable of being waived by the grantor at his pleasure (*d*); and as the law always leans against forfeitures (*e*), it will consider him as having waived his right to enter for breach of a condition subsequent, if, after notice of the breach committed, he does any act inconsistent with an intention to avail himself of the forfeiture. Thus, if a lease be made with a proviso that, in the event of the lessee's assigning his interest, the lessor shall be at liberty to enter on the land demised, as of his former estate; he will nevertheless not be entitled to enter, if, after an assignment made, he accepts rent from the assignee (*f*). By a modern enactment however (23 & 24 Vict. c. 38, s. 6), an actual waiver of the benefit of any covenant or condition in a lease by the lessor shall not (in the absence of any intention appearing to that effect) be assumed to extend to any breach other than that to which the waiver specially relates, nor to operate as a general waiver of the covenant or condition in question (*g*).

Such being the general nature of estates upon condition, specific notice is due to certain distinct classes of them. And I. as to such as are held in *gage* or pledge; such

(*c*) Co. Litt. 206 a. See Shrewsbury *v.* Scott, 6 C. B. (N.S.) 179.

(*d*) Co. Litt. 218 a.

(*e*) Ib. 206 b; Clay *v.* Bowler, 5 Ad. & Ell. 403, n.

(*f*) See Co. Litt. 211 b; Doe *d.* Nash *v.* Birch, 1 Mee. & W. 402; Doe *v.* Lewis, 5 Ad. & Ell. 277; Hartshorne *v.* Watson, 4 Bing. N. C. 178; Doe *v.* Rees, ib. 384.

(*g*) See, also, as to breaches of certain covenants in leases, 15 & 16 Vict. c. 76, s. 210; 22 & 23 Vict. c. 35, ss. 1—3, 4—9; 23 & 24 Vict. c. 126, ss. 1, 2; and 44 & 45 Vict. c. 41, s. 14.

pledge being of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

[*Vivum vadium*, or living pledge, a term not now occurring in practice, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as of 20*l. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower (*h*). But *mortuum vadium*, a dead pledge, or *mortgage*, is where a man borrows of another a sum and grants him an estate in fee or for a less interest on condition that if he, the mortgagor, shall repay the mortgagee the said sum (generally with interest thereon at a fixed rate) on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the usual way, that then the mortgagee shall re-convey the estate to the mortgagor. In this case the land, which is so put in pledge, is by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute: but so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage (*i*).]

As soon as the estate is created, the mortgagee, in the absence of any stipulation to the contrary, might immediately enter on the lands, but would be bound to restore them upon performance of the condition by payment of the mortgage-money at the day limited; and therefore it is usual to insert a provision that the mortgagor shall hold the land till the day assigned for payment: but in

(*h*) Co. Litt. 205 a; see Fenwick *v.* Reed, 1 Meriv. 119. As to mortgages of a *personal chattel*, see Flory *v.* Denny, 7 Exch. 581.

(*i*) Litt. s. 332. It may be observed that a mere deposit of title deeds without any conveyance will amount to a mortgage in contemplation of *equity*. (See Russell *v.* Russell, 1 Bro. C. C. 269.)

case of failure to pay at that period, the mortgagee is then entitled to enter and take peaceable possession; nor do the principles of *law* admit of his being afterwards evicted by the mortgagor (*k*). The mortgagee, however, is not in fact permitted to avail himself of the forfeiture, to any extent beyond what is necessary for the satisfaction of his reasonable claims. For here *equity* will interpose (*l*): and though a mortgage be thus forfeited, and the estate absolutely vested at law in the mortgagee, and although he has obtained possession, yet the mortgagor will be allowed to recall or *redeem* his estate, on paying to the mortgagee his principal, interest and expenses; for otherwise, in strictness of law, an estate worth 1,000*l.* might be forfeited for non-payment of 100*l.* or a less sum (*m*). It is, however, provided by the 37 & 38 Vict. c. 57, the Real Property Limitation Act, 1874 (which came into operation on the 1st January, 1879), that a mortgagor shall not be entitled to redeem but within *twelve years* next after the time that the mortgagee shall

(*k*) See Doe *v.* Giles, 5 Bing. 421; Doe *v.* Cadwallader, 2 Barn. & Adol. 473; Thunder *v.* Belcher, 3 East, 449; Doe *v.* Maisey, 8 Barn. & Cress. 767; Partington *v.* Woodcock, 6 Ad. & El. 695. It is supposed in the text that there is no tenant in possession, under a lease *prior* to the mortgage. If there be, his possession cannot of course be disturbed; but he may be compelled to pay over his rents to the mortgagee. If there be a tenant in possession under a lease granted by the mortgagor *subsequently* to the mortgage, and without the privity of the mortgagee, he may be ejected, unless indeed such subsequent lease was made under and in conformity with the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18.

(*l*) It may be observed that even when law and equity were administered in different courts (that is to say, prior to the Judicature Act, 1873), the principle of equity referred to in the text was, by 7 Geo. 2, c. 20, and 15 & 16 Vict. c. 76, introduced into the proceedings at law where the mortgagee brought ejectment. For the action would be stayed on the mortgagor's paying principal, interest, and costs.

(*m*) If the money be not repaid by the day assigned, and the mortgagee has neither demanded, nor taken any steps to compel, payment, he is entitled to receive from the mortgagor *six calendar months' notice in writing* of his intention to pay off the mortgage. (See Shrapnell *v.* Blake, 2 Eq. Ca. Ab. *in tit.* Mortgage, pl. 34.)

obtain possession or receipt of the profits of the land mortgaged or of rent: unless indeed an acknowledgment in writing shall have been given by such mortgagee of the right of the mortgagor, in which case the power of redemption is limited to a period of twelve years from such acknowledgment (*n*). And in favour of a mortgagee who has not obtained possession, it is enacted by 7 Will. IV. & 1 Vict. c. 28 (as amended by the same Real Property Limitation Act, 1874), that any person, entitled to or claiming under any mortgage of land, may make entry or bring action or suit to recover the same within twelve years next after the last payment of any part of the principal or interest secured by such mortgage;—and this he may do although more than twelve years may have elapsed since his right to enter or sue shall have first accrued (*o*).

The reasonable advantage above referred to, allowed to a mortgagor, is called the *equity of redemption* (*p*); and he may avail himself of it by taking proceedings "to redeem" in the proper court (*q*). If the mortgagee be not in possession, this proceeding (which as the general rule must be taken in the Chancery Division of the High Court of Justice) merely calls upon him for a reconveyance, on payment of principal, interest, and costs of suit (*r*): but

(*n*) Prior to this provision the period of limitation was twenty years (3 & 4 Will. IV. c. 27, s. 28).

(*o*) See Doe *d.* Palmer *v.* Eyre, 17 Q. B. 366; and Pugh *v.* Heath, 7 App. Ca. 235.

(*p*) In certain cases of accidental or formal difficulty in obtaining a reconveyance, (as where the mortgagee died intestate and without an heir,) the court might have formerly made an order having the effect of a reconveyance, (13 & 14 Vict. c. 60, s. 19); but the personal representative of such deceased mortgagee may now make the reconveyance (44 & 45 Vict. c. 41, s. 30).

(*q*) See Scotto *v.* Heritage, Law Rep., 3 Eq. Ca. 212.

(*r*) It may be here incidentally observed that, during the continuance of the equity of redemption, the *mortgagor* has been regarded in equity as the owner of the estate, subject only to the mortgage debt: and hence, on the death of the mortgagor, the mortgaged estate comes to the devisee (or heir) encumbered with this debt. By 17 & 18 Vict. c. 113 ("Locke King's Act," as to which see 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34), the

as against a mortgagee who has obtained possession, it prays that an account may be taken of all the rents and profits on the one hand, and of the principal, interest, and costs on the other; and that, on payment of what may appear due on such account, a reconveyance may be made, and the possession of the premises restored (*s*). On the other hand, the mortgagee, where his debt remains unpaid for more than a reasonable time after the time agreed on, may (although the time for redeeming be still running), take proceedings in chancery "for foreclosure," calling upon the mortgagor to redeem his estate presently, or in default thereof to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall (*t*). And also, in some cases of fraudulent mortgages (*u*), such as twice mortgaging the same lands without giving notice of the mortgage already effected, the fraudulent mortgagor forfeits all equity of redemption whatsoever (*v*). The mortgagee may also bring

estate so encumbered and devised or descending is, in the absence of an expressed intention to the contrary on the part of the mortgagor, charged with such his debt. Before these provisions, in the absence of an expressed intention, the *personal* estate of the deceased mortgagor was primarily liable. As to these Acts, see Maxwell *v.* Hyslop, Law Rep., 4 Eq. Ca. 407; Brownson *v.* Lawrance, ib., 6 Eq. Ca. 1; Nelson *v.* Page, ib., 7 Eq. Ca. 25; Coote *v.* Lowndes, ib., 10 Eq. Ca. 376; Lewis *v.* Lewis, ib., 13 Eq. Ca. 218; Sackville *v.* Smyth, ib., 17 Eq. Ca. 153.

(*s*) See Parkinson *v.* Hanbury, Law Rep., 2 H. of L. Ca. 1. By 37 & 38 Vict. c. 78, s. 4, it was provided, that the legal *personal representative* of a mortgagee might, on payment of the monies secured thereby, convey or surrender the mortgaged estate; but that section of this Act has been repealed by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 30), which has enacted that such personal representative *shall* (not merely *may*) in such a case reconvey the estate, whether the mortgagee die testate or intestate.

(*t*) Campbell *v.* Holyland, 7 Ch. D. 166. In such a suit, however, the court may direct a *sale* instead of a foreclosure (see 15 & 16 Vict. c. 86, s. 48; Newman *v.* Selfe, 33 Beav. 522; and 44 & 45 Vict. c. 41, s. 25).

(*u*) See stat. 4 & 5 W. & M. c. 16.

(*v*) In cases where the land is mortgaged to several persons, each ignorant of the other incumbrances, the maxim *qui prior est tempore, potior est jure*, prevails, where all the mortgages are equitable (see Jones *v.* Jones, 8 Sim. 633; Wilmot *v.* Pike, 5 Hare, 14); but preference is given, in the general case, to the mortgagee in

the estate to sale in satisfaction of his debt, (paying over the surplus proceeds, if any, to the mortgagor,) even without resorting to the expedient of proceedings in equity, provided the security be taken (as is now the usual practice), in such form as to authorize that course of proceeding (*x*); and even if no power of sale be conferred by the terms of the instrument, he may still bring the estate to sale in such manner as is provided by the modern Act of 44 & 45 Vict. c. 41 (*y*).

It may be here remarked that it forms one of the provisions of the Judicature Act, 1873, that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises on a lease or other contract made by him jointly with any other person (*z*).

The state of the law, as above explained, with respect to mortgages, affords the reader an example of the distinction referred to in a former place between *legal* and *equitable* estates (*a*). At law, the ownership of the land, as we have seen, is considered as absolutely vested, upon the non-payment of the money advanced, in the mortgagee. The doctrines of equity, on the other hand, hold

possession of the legal estate. (Goddard *v.* Complin, 1 Cha. Ca. 119.)

(*x*) The concurrence of the mortgagor is not required in such sale. (See Corder *v.* Morgan, 18 Ves. 344.)

(*y*) By this Act a mortgagee has now several powers as incident to his estate, though not in form conferred by the deed. These relate to the selling, &c., the insuring against fire, and the appointment of a *receiver*, who shall receive the rents and profits as agent of the person entitled to the property subject to the charge. (44 & 45 Vict. c. 41, ss. 19—24.)

(*z*) 36 & 37 Vict. c. 66, s. 25 (5).

(*a*) Vide sup. p. 230; 1 Sand. Uses, 203, 2nd ed.

the mortgagor to be the true owner until a foreclosure shall have taken place (*b*). There exists, therefore, in respect of the same subject-matter, a legal and an equitable estate; the former being vested in the mortgagee, the latter in the mortgagor.

II. There is another species of estates defeasible on condition of which some mention is due, though in modern times they have been superseded by other remedies for the benefit of creditors—such having been the object of their original introduction. [These estates are those held by *statute merchant* and *statute staple* (*c*); and they are very nearly related to the *vivum vadium* before mentioned (*d*). For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I., *De mercatoribus*, and thence called a statute merchant: the other pursuant to 27 Edw. III. stat. 2, c. 9, before the mayor of the "staple;" that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns: from whence this security was called a statute staple. They are both securities for debts acknowledged to be due, and were originally permitted only among traders for the benefit of commerce; and, when entered into, not only the body of the debtor might be imprisoned, and his goods seized in satisfaction of the debt, but also his lands might be taken by the creditor, till out of the rents and profits of them the debt was satisfied; and, during such time as the creditor so held the lands, he was termed tenant by statute merchant or statute staple.] The benefit of this mercantile transaction was afterwards, by virtue of the statute 23 Hen. VIII. c. 6, extended to all the king's

(*b*) Cashborn *v.* Scarfe, 7 Vin. Ab. 156; 2 Eq. Ca. Ab. 728, S. C.; and see Amherst *v.* Dawling, 2 Vern. 401.

(*c*) As to these estates, see 2 Inst. 322; 2 Saund. by Wms. 69 c, n. (3); Reeves's Hist. Eng. Law, vol. ii. pp. 161, 393.

Vide sup. p. 303.

subjects, whether traders or not (*e*). And such recognizance *in the nature* of a statute staple was directed by the Act to be acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; and to be enrolled and certified into chancery (*f*).

III. There is also an estate on condition, which is created by operation of law, for security and satisfaction of debts, which is called an estate of *elegit*. [What an *elegit* is, and why so called, will be fully explained in a subsequent part of this work (*g*). At present it may be sufficient to mention that it is the name of a writ, founded on the statute of Westminster the second (*h*), by which, after judgment in an action has been obtained, the sheriff gives the judgment creditor possession of the lands and tenements of the opposite party, to be occupied and enjoyed until the money due on such judgment is fully paid; and during the time the judgment creditor so holds them he is called tenant by *elegit*. It is easy to observe that this is also a mere conditional estate, defeasible as soon as the judgment debt is levied (*i*).] And by this writ, at one period, only one half of the lands and tenements of the judgment debtor could be seized in execution. For as the general right which a man possessed of aliening his lands by his own act did not (as is commonly supposed) extend at the time of the passing of the statute of Westminster the second,

(*e*) This Act was amended by 8 Geo. 1, c. 25.

(*f*) It has been remarked (see Burt. Compend. 298) that the law relative to statute staple is still so far of practical importance, that by 33 Hen. 8, c. 39, and 13 Eliz. c. 4 (see Reg. *v.* Ellis, 4 Exch. 652), persons indebted to the crown are to incur, in certain cases, the same liability *as if* they were bound in a statute staple.

(*g*) Vide post, bk. v. c. x.

(*h*) 13 Edw. 1, c. 18. See 2 Saund. by Wms. 68 a, n. (1); Hist. Eng. Law, by Reeves, vol. ii. p. 187.

(*i*) Dighton *v.* Greenvil, 2 Vent. 327; Price *v.* Varney, 3 Barn. & Cress. 733. The estate by elegit is also put an end to by the *sale* of the premises under the direction of the court, on the application of the tenant under 27 & 28 Vict. c. 112, s. 4.

(A.D. 1285,) to the whole of his lands (*k*),—that statute permitted them to be only partially affected by the process of law for his ordinary debts (*l*); though on the other hand, by the statute *De mercatoribus*, passed in the same year, the *whole* of a man's lands were made liable to be pledged in a statute merchant, for a debt contracted in trade. So much more readily did the feudal restraint on alienation yield to considerations of a commercial kind, than to any others. And such continued to be the state of the law as to the writ of elegit, until the modern statute 1 & 2 Vict. c. 110; which for the first time enabled the judgment creditor to seize by that writ the *whole* of the judgment debtor's lands and tenements (*m*).

[We shall conclude our notice of the estates by statute merchant, statute staple, and elegit, with this remark, that though the tenants are said to hold *ut liberum tenementum* until their claims are satisfied, yet are their estates no freeholds, but chattels, and pass to their *personal representatives* (*n*): which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts his personal representative is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong.

(*k*) Wright's Ten. 154. Blackstone says, that "before the statute "of *Quia emptores*, 18 Edw. 1, c. 1, "it is generally thought that the "proprietor of lands was enabled "to alienate no more than a *moiety* "of them."—2 Bl. Com. p. 161.

(*l*) 13 Edw. 1, c. 18.

(*m*) 1 & 2 Vict. c. 110, s. 11. The same statute (s. 18), and 27 & 28 Vict. c. 112, s. 2, provide, in effect, that decrees and orders and rules of court (including such as are made in equity, lunacy, or bankruptcy), "whereby any money shall be payable to any person," shall have the effect of *judgments* in actions; and the persons to whom money is thus payable are consequently, as judgment creditors, entitled to become *tenants by elegit*. See further as to an elegit, post, bk. v. c. x.

(*n*) Co. Litt. 42 a, 43 b; 2 Inst. 322.

[And, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged; this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors (*o*): because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.]

(*o*) Co. Litt. 42 a.

CHAPTER VII.

OF ESTATES IN POSSESSION, REVERSION, AND REMAINDER.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view: with regard to the *time of their enjoyment* (*a*). When contemplated in this light, they are either in *possession* or in *expectancy*. Where a man is entitled immediately to the possession, by virtue of any of the estates or interests which we have been considering, his estate is said to be in possession (*b*); when entitled to it, not immediately, but at some future time, his estate is said to be in expectancy. Of expectancies, again, there are, at the common law, two sorts; one called a *reversion;* the other a *remainder*.

I. Of estates in *possession* not much remains to be observed. All the estates hitherto mentioned have been supposed to be of this kind; for in laying down general rules we usually apply them to such estates as these. But it is material further to remark of them, that a man may have an estate in possession in land, and may yet not be

(*a*) Vide sup. p. 230.

(*b*) Blackstone (vol. ii. p. 163) defines estates in possession as "those whereby a present interest "passes to and resides in the "tenant, not depending on any "subsequent circumstance or con- "tingency." So it is said in 2 Cruise, Dig. 258, "that estates in "possession are those where the "tenant is entitled to the actual "pernancy of the profits."

in actual possession of the land; for he may be *disseised* (*c*), that is, put out of the actual seisin, supposing his estate to be freehold; or may be deprived or ousted of the actual possession (whatever may be the nature of his estate), in some one of the wrongful ways which will hereafter be described when we come to treat of the various modes of civil injury (*d*); but, however ousted, he will still retain an estate in possession, according to the sense in which that term is above used. In such a case the true owner is also said to have the *right of possession* (*e*); as opposed to the mere *naked possession* of the wrongdoer: and this right of possession involves also the *right of entry* (*f*), that is, the right of entering upon and taking possession of the land withheld, if he can do so without breach of the peace: while, on the other hand, the naked possession of the wrongdoer is capable—by length of time and the neglect of the true owner to assert his right—of ripening, after a certain period (fixed, in general, at twelve years), into a lawful and indefeasible estate (*g*). Without pausing, however, upon these subjects, the further development of which belongs to a later portion of our work, we shall now proceed to examine the doctrine of estates in expectancy.

II. An estate, then, in *reversion* (*h*), to the nature of which we have already had occasion in some measure to

As to disseisin, see Co. Litt. 181 a; Taylor *v.* Horde, 1 Burr. 60; Williams *v.* Thomas, 12 East, 141; Doe *v.* Perkins, 3 Mau. & Sel. 275.

(*d*) Vide post, bk. v. c. VIII.

(*e*) Bl. Com. vol. ii. p. 195; ib. vol. iii. p. 177; Gilb. Ten. 21.

(*f*) The right of entry also involves that of proceeding against the wrongdoer by *ejectment*, or by an action in the nature of ejectment, which is the present mode for recovering, by action, land wrongfully withheld. The antient forms of proceeding called *real actions*, by which land might also formerly be recovered, were, with some very few exceptions, abolished by 3 & 4 Will. 4, c. 27, s. 36 (vide post, bk. v. c. VIII.).

(*g*) See 37 & 38 Vict. c. 57.

(*h*) Lord Coke treats of remainders before reversions, and is followed in this by Blackstone. But the order chosen in the text would seem to be the more natural and convenient.

refer, is where any estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived; the latter interest is called the *particular estate* (as being only a small part or *particula* of the original one), and the ulterior interest is called the *reversion* (*i*). Thus, upon the creation by the owner of the fee, of any estate in tail, for life, or for years, the residue of the fee undisposed of is described as the reversion expectant upon the particular estate in tail, for life, or for years, so created. As soon as the particular estate is thus carved out of the original one (no further disposition being made), the expectant interest or reversion continues vested in him who was before the owner of the whole, *ipso facto* and without any special reservation for the purpose (*j*). For where a smaller estate is merely taken out of a larger, the residue remains, as of course, in the original proprietor. This reversion is an actual interest or estate (*k*); but it is an estate in expectancy only, and not in possession, because the reversioner has no right to the possession until the particular estate is determined.

The tenant of a particular estate in tail, for life, or years, holds, as we have elsewhere shown, of the reversioner, by fealty and by such services as are reserved between them (*l*). Hence the usual *incidents* to reversions

(*i*) Lord Coke says, "A reversion is where the residue of the "estate always doth continue in "him that made the particular "estate, or where the particular "estate is derived out of his estate, "as in the case tenant in fee simple "maketh gift in tail, &c." (Co. Litt. 22 b.) He elsewhere speaks of a reversion as a returning of the land to the grantor or his heirs after the grant is over (Co. Litt. 142 b); but this is a wider sense of the term than is usually attached to it, and would include a *possibility* of *reverter* (vide sup. p. 243), and an *escheat* (vide sup. pp. 178, 199, 209). A reversion is defined by Blackstone (vol. ii. p. 175) as "the "residue of an estate left in the "grantor, to commence in possession after the determination of "some particular estate granted "out by him."

(*j*) Litt. s. 19.

(*k*) Wiscot's case, 2 Rep. 61; see Doe *v.* Gatacre, 5 Bing. N. C. 619.

(*l*) Vide sup. pp. 234, 247.

are said to be fealty and rent (*m*); rent being the usual description of service. [When no rent is reserved on the particular estate, fealty however results of course as an incident quite inseparable: and in the case where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and, by special words, the reversion may be granted away, reserving the rent; but by a *general* grant of the reversion, the rent will pass with it as incident thereunto, though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *è converso;* for the maxim of law is *accessorium non ducit sed sequitur suum principale* (*n*).]

Where a freehold reversion (that is, a reversion in fee, in tail, or for life) is expectant on a particular estate of freehold, the reversioner is said to be "seised of the reversion as of fee," (or if his estate be for life, "as of freehold"); and not to be "seised of the land in his demesne as of fee" (or "freehold"), as in the case of an estate in possession. But if a freehold reversion be expectant on a particular estate for years, it is in that case correct to describe the reversioner as "seised of the land in his demesne as of fee;" for his estate is considered (owing to the small regard once paid to chattel interests), as amounting for many purposes to a freehold estate in possession, and the possession of the termor constitutes the seisin of the freeholder (*o*). Of a reversion expectant on a particular estate of freehold, no dower or curtesy can (as we have seen) be claimed; but it is otherwise of a reversion expectant on a term of years (*p*).

By the principles of the *common law*, if the tenant of

(*m*) "An incident," says Lord Coke, "is a thing appertaining to "or following another, as more "worthy or principal."—Co. Litt. 151 a.

(*n*) Co. Litt. 151 b, 152 a.

(*o*) Wrotesley *v.* Adams, Plowd. 191; Butler, Co. Litt. 330 b, n. (1); Co. Litt. 17 a; 16 East, 350; Doe *v.* Finch, 4 B. & Adol. 305.

(*p*) Co. Litt. 29 b, 32 a; 2 Bl. Com. 127; Stoughton *v.* Leigh, 1 Taunt. 410; vide sup. pp. 265, 269.

the particular estate for life or years made a conveyance by feoffment, for an estate not warranted by the nature of his interest; as where tenant for life made a feoffment in fee, or tenant for years a feoffment for life; it destroyed the particular estate, by converting it into a new and wrongful one; and by consequence it *displaced* or *divested* the reversion in expectancy thereon. And, on the other hand, it also operated as a *forfeiture* to the person in reversion, and gave him an immediate right to enter and take possession, in defeasance of the wrongful estate so created (*q*). The law, however, on these points is now to be understood as subject to the effect of a modern statute, 8 & 9 Vict. c. 106, of great importance, by which it is provided (sect. 4), that "a feoffment made after 1st October, 1845, shall not have any tortious operation" (*r*).

[Another doctrine, connected with the law of estates in reversion, is that of "merger." It is a general principle of law, that where a greater estate and a less coincide and meet in one and the same person, without any intermediate estate (*s*), the less is immediately annihilated, or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be a tenant for

(*q*) Litt. s. 415; Co. Litt. 251 a, b; Chudleigh's case, 1 Rep. 135 b; Archer's case, ibid. 66 b; 2 Bl. Com. 153, 274; Doe *v.* Howell, 10 Barn. & Cress. 191. The same effects also in general followed, where the particular tenant for life made a wrongful alienation by way of *fine* or *recovery* (conveyances now abolished by 3 & 4 Will. 4, c. 74). See Co. Litt. 356 a, 251 b; Doe *v.* Gatacre, 5 Bing. N. C. 609.

(*r*) We may take the opportunity here of noticing a previous Act, "To simplify the Transfer of Pro-"perty," (7 & 8 Vict. c. 76,) which, though repealed by the 8 & 9 Vict. c. 106, was nevertheless in force, as to the greater part of its provisions, from the 31st December, 1844, to the 1st October, 1845, and consequently still affects the title to land during that period. Of this Act, it was remarked by Mr. Justice Maule (in the case of Stratton *v.* Pettit, 16 C. B. 432), "that it was "incongruous and impossible of "operation; and its absurdities "were so great that the framers "themselves had no very distinct "notion of its meaning."

(*s*) Duncomb *v.* Duncomb, 3 Lev. 437.

[years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more (*t*). But they must come to one and the same person, *in one and the same right;* for if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger (*u*). Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge: for he hath the fee in his own right, and the term of years in the right of the testator, subject to his debts and legacies. So, also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife (*v*). An estate tail is an exception in the general law of merger; for a man may have, in his own right, both an estate tail and a reversion in fee; and the estate tail, though a less estate, shall not merge in the fee (*x*). For estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De donis;* which operation and construction have

(*t*) By 8 & 9 Vict. c. 106, s. 9, when the reversion expectant on a lease (made either before or after the passing of that Act), shall, after the 1st October, 1845, be surrendered or merge, "the estate "which shall for the time being "confer, as against the tenant "under the same lease, the next "vested right to the same tene-"ments or hereditaments, shall,— "to the extent and for the pur-"pose of preserving such inci-"dents to, and obligations on, "the same reversion, as, but for "the surrender or merger thereof, "would have subsisted—be deemed "the reversion expectant on the "same lease." This enactment was framed with the object of securing—*e. g.* the termor's rights with respect to *rent* due from his under-lessee; for such rent, as an incident to such termor's reversion (vide sup. p. 315), would have perished on his acquiring the fee.

(*u*) See Jones *v.* Davies, 5 H. & N. 766.

(*v*) Bracebridge *v.* Cook, Plowd. 418; Platt *v.* Sleap, Cro. Jac. 275; Co. Litt. 338 b. For cases in which a merger will be prevented, see also Fearne's Cont. Rem. 341, 9th edit.

(*x*) Wiscot's case, 2 Rep. 61 a; Lord Stafford's case, 8 Rep. 74 b.

[probably arisen upon this consideration, that in the common cases of merger of estates for life or years, by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate (*y*). But in an estate tail the case is otherwise; the tenant for a long time had no power at all over it so as to bar or to destroy it, and to this day cannot bar or destroy it except in a special method: it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate and defeat the inheritance of his issue; and hence it has become a maxim that a tenancy in tail, which cannot be surrendered, cannot be merged in the fee (*z*).] Merger, it is to be observed, is not confined to cases where one of the coinciding estates is greater than the other in point of *quantity of interest;* for a term of years will merge in the immediate reversion, though that be a chattel interest also; and even where the term of years in reversion is of shorter duration than the term on which it is expectant, the merger will equally take place (*a*). So a fee simple conditional will merge in the possibility of reverter (*b*).

III. An estate in *remainder* arises where an estate is

Hughes *v.* Robotham, Cro. Eliz. 302.

(*z*) Where a tenant in tail, however, acquired a base fee, and had also the immediate reversion, the base fee would formerly merge in the reversion; and by 3 & 4 Will. 4, c. 74, s. 39, a base fee will now be *enlarged*, under such circumstances, into a fee simple absolute. It may be here noticed that under the Judicature Act, 1873, "there shall not be after the 2nd November, 1874, any merger, by operation of law only, of any estate, the beneficial interest in which would not be deemed to be merged or extinguished *in equity*." (36 & 37 Vict. c. 66, s. 25.)

(*a*) See Bac. Abr. Leases, &c. (S.) 2; 3 Prest. Conv. 182; Doe *v.* Walker, 5 Barn. & Cress. 111.

(*b*) Simpson *v.* Simpson, 4 Bing. N. C. 333.

granted out of a larger one, an ulterior estate immediately expectant on that which is so granted being at the same time conveyed away by the original owner. The first estate so granted is called the particular estate, and the ulterior one the remainder (*c*). [As if a man seised in fee simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs for ever; here A. is tenant for years, remainder to B. in fee. In the first place an estate for years is created or carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee (*d*). They are indeed different *parts*, but they constitute only one *whole*: they are carved out of one and the same inheritance; they are both created and may both subsist together; the one in possession, the other in expectancy. So if land be granted to A. for twenty years, and, after the determination of the said term, to B. for life; and after the determination of B.'s estate for life, it be limited to C. and his heirs for ever: this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A.'s estate for years carved out of it; and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders for life and in fee, are one estate only, being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would still be

Lord Coke defines a remainder as "a remnant of an estate in lands "or tenements, expectant upon a "particular estate created together "with the same at one time," (Co. Litt. 143 a); Blackstone, as "an estate limited to take effect "and be enjoyed after another "estate is determined." (2 Bl. Com. 164.) As to the definition of a remainder, see also Fearne, by Butler, p. 3, n. (*c*), 9th ed.

(*d*) Co. Litt. 143 a; Fearne, by Butler, 308, 9th ed.

[the same thing; upon a principle grounded in mathematical truth; that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee simple (*e*); because a fee simple is the highest and largest estate that a subject is capable of enjoying (*f*): and he that is tenant in fee hath in him the *whole* of the estate: a remainder, therefore, which is only a portion or residuary *part* of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee simple; as 40*l.* is part of 100*l.*, and 60*l.* is the remainder of it; wherefore, after a fee simple once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting.] But until the whole fee simple is granted away, any quantity of interest may be carved out of it, expectant on the determination of some preceding interest. Therefore, a remainder, like an estate in possession, may be either in fee, in tail, for life, or years.

From what has been premised, it appears that a reversion and a remainder are both estates in expectancy, but differ in this respect, that the former remains in the grantor, by act or construction of law, as part of his former estate, but a remainder is an estate newly created by the act of the grantor. And here it is very material to remark, that it is *only* by way of remainder that, at *common law*,—that is, independently of certain conveyances founded on statute law to be hereafter mentioned, —a man can create a new freehold estate in expectancy, in a corporeal hereditament. For it is an antient rule, which lies at the root of the learning relative to remainders, that a freehold in hereditaments corporeal cannot be created to commence *in futuro* (*g*)—that is, to

Colthirst *v.* Bejushin, Plowd. 29; Gardner *v.* Sheldon, Vaugh. 269.

(*f*) Vide sup. p. 235.

(*g*) Barwick's case, 5 Rep. 94 b; 2 Bl. Com. 165.

take effect in possession at a distant period of time—without the interposition of a particular estate on which it shall be expectant. Thus if A. seised in fee of lands, convey them to B. to hold to him and his heirs for ever, after the end of three years next ensuing;—this is, at common law, a void conveyance. This is because no freehold could in general be created at common law, in a corporeal hereditament, without livery of seisin (*h*); a ceremony in its nature incompatible with a grant of the freehold *in futuro*, inasmuch as it imports a delivery of possession, and consequently supposes that a right to the immediate possession, and not merely a future estate, is conveyed by the feoffor. And as it is the necessity for livery of seisin which constitutes the reason of the rule, so the rule itself extends not to mere chattel interests (*i*): for these, being created, as we have seen, without that ceremony, are also capable (even at common law) of being made to commence *in futuro*. Thus, though the fee could not be created to hold as from next Michaelmas, yet a lease for seven years from next Michaelmas would be good.

But while the conveyance by livery of seisin is incapable (without the interposition of a particular estate) of

(*h*) Vide sup. p. 231. The reason here assigned, for the rule that a freehold cannot commence *in futuro*, is that usually given in the books. See Co. Litt. 217 a; Plowd. 156; Barwick's case, 5 Rep. 94 b; 2 Bl. Com. 165; Bac. Ab. Remainder (C). And perhaps no sufficient authority can be shown for referring it to any other origin. It is held, however, by some writers to flow from the general principle of the common law, that the freehold is not to be placed (except in cases of strict necessity) in abeyance. That this principle existed there can be no doubt; and it seems clearly to have applied both to the immediate freehold and to the ultimate fee. (See the argument of Mr. Justice Blackstone in the case of Perrin *v.* Blake, Harg. Law Tracts.) It has been considered by some as in part founded on feudal reasons, but it seems to be more satisfactorily accounted for by the inconveniences which resulted from such suspension of the fee or freehold, in reference to the system of *real actions*—the remedies antiently used for the recovery of land. As to the cases where the freehold or fee *may* be in abeyance, vide sup. p. 287.

(*i*) 5 Rep. 94; Bl. Com. ubi sup.

being applied to the creation of a freehold which shall take effect in possession at a future time, its adaptation is made easy by the interposition of a particular estate, that is to say, by creating the freehold *in remainder*. For the method in this case is to make the livery of seisin to the tenant of the particular estate; which is effectual as a conveyance also to the remainder-man, since his estate and that of the particular tenant are one and the same estate in law. [Thus a man may convey to A. in tail, remainder to B. in fee, and the same livery which conveys the estate tail to A. will also pass the remainder expectant thereon to B. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder, at the same time that the particular tenant is seised of his estate tail (*k*).] And the case is the same where the particular estate is for years only. As where one leases to A. for three years, with remainder to B. in fee, and makes livery to A. Here the livery indeed is not necessary for the lessee himself, because he has but a chattel: but it enures to the benefit of him in remainder, and the freehold is immediately created thereby and vested in B. during the continuance of A.'s term of years (*l*).

With respect to the creation of a remainder, the following rules may be laid down, which, though they amount to no more than an exposition of the different properties expressed in the very definition of this kind of estate, may yet serve to convey to the mind of the reader a more precise idea of its character:—

1. *There must be some particular estate precedent to the estate in remainder* (*m*). The necessity of this is sufficiently indicated by the term itself; for remainder is a *relative* expression, and implies that some part of the thing is previously disposed of. [And as no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the re-

(*k*) Co. Litt. 143 a.
(*l*) Ib. 49 a, 49 b.
(*m*) Fearne, by Butler, p. 390, 9th edit.

[mainder. But a lease at will is not held to be such a particular estate as will support a remainder over (*n*). For an estate at will is of a nature so slender and precarious that it is not to be looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder.]

2. A second rule to be observed is this; that *the remainder must commence or pass out of the grantor, at the time of the creation of the particular estate* (*o*). As where it is proposed to give to A. an estate for life, with remainder to B. in fee: here B.'s remainder in fee must pass from the grantor, at the same time with A.'s life estate in possession; for if the estate, ulterior to that for life, continues in the grantor, it is a reversion, and no remainder; and B. can take only by subsequent grant of this reversion.

3. It may also be laid down, as a third rule respecting the creation of remainders, that *they must be limited to take effect in possession immediately upon the determination of the particular estate, and neither later nor earlier* (*p*). Thus if A. be tenant for life, remainder to B. in tail, here B.'s remainder is to take effect in possession immediately upon A.'s death; or if A. and B. be tenants for their joint lives, remainder to the survivor in fee, here, on the death of either, the remainder comes into possession instantly; and therefore both these are good remainders. But if the future estate is to take effect in possession at any period *later* than the determination of the first, as if an estate be granted to A. during his life, and upon his death and one day after, to B. and his heirs, this is no remainder (*q*). So the future estate will be no remainder if it is not to *await* the proper and regular determination of the first,

(*n*) Lord Stafford's case, 8 Rep. 75 a.

(*o*) 2 Bl. Com. 167; Plowd. 25; Litt. s. 721; Bac. Ab. Remainder (C.)

(*p*) 1 Sand. Uses, 148, 2nd edit.; Chudleigh's case, 1 Rep. 135 a; Boraston's case, 3 Rep. 21 a; Co. Litt. 298 a.

(*q*) Colthirst *v.* Bejushin, Plowd. 25; Fearne, by Butler, 307, 9th ed.

but to take effect in defeasance or abridgment of it; as where an estate is limited to A. for life, but if B. pays him a certain sum of money, then immediately to B. and his heirs (*r*). But though a remainder cannot be limited to take effect in possession, until the particular estate regularly determines, yet eventually it may do so before that period. Thus if the particular estate determine by act of law (as by forfeiture) before its natural expiration, the remainder limited upon it, will come into immediate possession, and is not required to wait until the expiration of the period originally assigned.

A remainder, when created, is subject to many of the rules already laid down with respect to reversions. Thus, in the case of a freehold remainder, the remainder-man is seised as of fee (or as of freehold), but not "in his demesne;" unless the particular estate be a term of years, when seisin in demesne may be properly alleged. So *curtesy* or *dower* may be claimed of a remainder in fee, if expectant on an estate for years, but not if expectant on a freehold. Thus, too, the wrongful feoffment of the tenant for life or years, where the estate immediately expectant is not by way of reversion but remainder, had, at *common law*, the effect of displacing the remainder, and occasioning a forfeiture to the remainder-man, as in the other case to the reversioner (*s*). Moreover the union of an estate in remainder with the particular estate on which it is expectant, will produce a merger in the same cases (in general) and on the same principles, as if it were an estate in reversion (*t*).

Hitherto our remarks have related to remainders generally considered; but it is now time to turn our attention to the distinction which exists between remainders, as being either *vested* or *contingent*. *Vested* remainders or

(*r*) 1 Sand. Uses, 143, 149; Sugd. Gilb. 152, n.; Fearne, by Butler, p. 261, 9th ed.

(*s*) But it is otherwise since the passing of the statute 8 & 9 Vict. c. 106 (s. 4), as to which, vide sup. p. 316.

(*t*) As to the merger of a term of years in another term of years, where the second is in *remainder*, see Bac. Leases, &c. (S) 2.

remainders *executed* are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder. *Contingent* or *executory* remainders are those limited either to an uncertain *person*, or upon an uncertain *event* (*u*): that is, to a person not *in esse* or not ascertained (*x*); or upon an event which may not happen at all, or not happen until after the particular estate is determined (*y*). The first kind or those limited to an uncertain person, may be exemplified by a limitation to A. for life, remainder to the first son of B., who has then no son born (*z*); for here the person is not *in esse*: or to A. and B. for their joint lives, remainder to the survivor in fee; for here the person is not ascertained (*a*). The second kind, or those limited on an uncertain event, may be exemplified by a lease to A. for life, remainder to B. for life, and if B. should die before A., then the remainder to C. for life (*b*); for B.'s dying before A. is an event that may never happen, and therefore the remainder to C. is

(*u*) Blackstone says (vol. ii. p. 169) that they are where the remainder is "limited to take effect "either to a dubious and uncertain "*person*, or on a dubious and uncer- "tain *event*; so that the particular "estate may chance to be deter- "mined, and the remainder never "take effect." (And see Roberts *v.* Roberts, 2 Bulst. 130.) Mr. Fearne enumerates four different kinds of contingent remainders:—"1st. "Where the remainder depends en- "tirely upon a contingent deter- "mination of the preceding estate "itself. 2ndly. Where the contin- "gency on which the remainder is "to take effect, is independent of "the determination of the preceding "estate. 3rdly. Where the condi- "tion upon which the remainder is "limited is certain in event, but "the determination of the parti- "cular estate may happen before "it. 4thly. Where the person to "whom the remainder is limited "is not yet ascertained, or not "yet in being." (Fearne, by Butler, p. 5, 9th ed.) But all these may be reduced to two, as in the text, with the aid of the distinctions there stated, as to the *nature* of the uncertainty to which the person or event may be subject.

(*x*) Fearne, ubi sup. p. 9. See Doe *d.* Bills *v.* Hopkinson, 5 Q. B. 228.

(*y*) Fearne, ubi sup. p. 8.

(*z*) Ib. p. 9.

(*a*) Ibid.

(*b*) Ib. p. 7.

contingent: or, as another instance, by a lease to A. for life, and after the death of B. the lands to remain to another in fee (*c*); for though it is certain that B. must die, his death may not happen until after A.'s life estate shall be determined.

It is to be observed, however, that if there be no uncertainty in the person or event upon which the remainder itself is limited, the mere uncertainty whether it will ever take effect in *possession*, is not sufficient to give it the character of a contingent remainder (*d*). Thus in the case of a lease to A. for life, remainder to B. for life, the limitation of the remainder is to a person in being, and ascertained, and the event on which it is limited is certain, viz. the determination of A.'s life estate: it is therefore a vested, and not a contingent, remainder (*e*): and yet it may possibly never take effect in possession; because B. may die before A.

We may also remark, that an estate limited to an existing and ascertained person upon the determination of an estate tail, as where there is a limitation to A. in tail, remainder to B. in fee, is a vested and not a contingent remainder; for it is considered in law, that the estate tail, being a particular estate, is sure to come to an end, and that the failure of issue is consequently not a contingency, but a certain event (*f*). The case falls, therefore, within the definition of a vested remainder; the estate limited to B. being one that is invariably fixed to remain to a determinate person after the particular estate is spent.

It was laid down in a former place, that no remainder can be limited after a fee simple (*g*). A contingent remainder may, however, be limited in *substitution* for another contingent remainder in fee simple; as if land be given to A. for life, and if he have a son, then to that

(*c*) Fearne, by Butler, p. 8, 9th ed.
(*d*) Ib. p. 216.
(*e*) Ibid.; see Doe *v.* Scudamore, 2 Bos. & Pul. 296.
(*f*) Vide sup. pp. 243, 244.
(*g*) Vide sup. p. 320.

son in fee, and if he have no son, then to B. in fee (*h*). This has been sometimes called *a contingency with a double aspect* (*i*), and it is no violation of the rule above alluded to; for such remainders as these are *concurrent* and not *consecutive;* and though both are remainders on the particular estate, they are not remainders on each other (*k*).

It is laid down by Lord Coke, as to the nature of the contingency on which a remainder may be limited, that it must be *potentia propinqua*, which he also designates as a *common possibility*, and must not be *potentia remota*, by which he seems to mean a possibility that cannot reasonably be expected to happen (*l*); and of this doctrine Blackstone (*m*) gives the following example, which is substantially the same with one of those adduced by Lord Coke himself. [A remainder to a man's eldest son who hath none, we have seen, is good, for by common possibility he may have one; but if it be limited in particular to his son John or Richard, it is bad if he have no son of that name, for it is too remote a possibility that he should not only have a son, but a son of the particular name.] But the rule that a remainder cannot be limited

(*h*) See Fearne, by Butler, p. 377, 9th ed.; Loddington *v.* Kime, 1 Lord Raym. 208; Keene *v.* Dickson, 3 T. R. 495; Crump *v.* Norwood, 2 Marsh. 161.

(*i*) Fearne, ubi sup.; Loddington *v.* Kime, 1 Lord Raym. 208.

(*k*) Though a contingent remainder in fee is a disposition (subject to the particular estate) of the *whole* inheritance, yet, as it is one which cannot take effect until the contingency happens, a question has been made as to what becomes of the inheritance in the meantime. According to the older authorities it is in *abeyance*, or, according to Lord Coke's allusion, *caput inter nubila condit*. (Co. Litt. 342 b; and see Year Book, 40 Edw. 3, 9.) But Mr. Fearne argues (and his opinion is now generally received) that it continues to reside in the grantor. (Fearne, ubi sup. p. 350.) Where the contingent remainder in fee is created by one of those conveyances which derive their operation from the statute of uses (as to which hereafter), it is clear that the fee remains in the grantor till the contingency happens; and where it is created by a will the fee descends to the heir at law. (2 Saund. by Wms. 381 a, n. (16).)

(*l*) Cholmley's case, 2 Rep. 51; Co. Litt. 378.

(*m*) 2 Bl. Com. p. 170.

upon a *potentia remota* (sometimes called a *double possibility* or a *possibility upon a possibility*) is no longer generally recognized (*n*); and as thus exemplified, at least, is not of a satisfactory character.

Contingent remainders are subject to the following two general rules:—

1. [*If they amount to a freehold, they cannot be limited on an estate for years, or any other particular estate less than a freehold.* Thus if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void; but if granted to A. for life, with a like remainder, it is good (*o*). For, unless the freehold passes out of the grantor at the time when the contingent remainder is created, such freehold remainder is void (*p*): it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere: unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.]

2. *Every contingent remainder must become vested either during the continuance of the particular estate, or* eo instanti *that it determines* (*q*).

It is obvious that when the contingent person comes into

(*n*) See Fearne, by Butler, p. 251, n. (*c*), 9th ed.; Third Real Property Rep. p. 29; Lord St. Leonards' judgment in Cole *v.* Sewell, 4 Dru. & War. 1, 32.

(*o*) Chudleigh's case, 1 Rep. 130 a.

(*p*) See Fearne, ubi sup. p. 281.

(*q*) Archer's case, 1 Rep. 66 b; Co. Litt. 298 a; Bac. Ab. Remainder (D.); 2 Saund. by Wms. 387, n. (7); Fearne, ubi sup. pp. 307, 310; 2 Bl. Com. 168, in which last work the rule is laid down, as to remainders *generally*, thus: "that "the remainder must vest in the "grantee during the continuance of "the particular estate, or *eo instanti* "that it determines." And this is the form in which it is often expressed. But where a remainder is not originally contingent, it is necessarily vested from the time of its creation; and cannot be said properly to vest during the continuance of the particular estate, and still less upon its determination. The rule, therefore, has, in effect, no application except to *contingent* remainders.

being or is ascertained during the continuance of the particular estate, or the contingent event takes place during that period, the remainder ceases to be a contingent, and becomes a vested one. Thus if A. be tenant for life, with remainder to B.'s eldest son, then unborn, in tail; the instant that a son is born, the remainder is no longer contingent but vested (*r*). On the other hand, if the person comes into being or is ascertained, or the event happens, not during the continuance of the particular estate, but immediately on its determination, the remainder then of course takes effect as an estate in possession; or, in other words, vests in possession, instead of vesting, as in the case first supposed, in point of interest only. Thus if land be given to A. and B. during their joint lives, remainder to the survivor in fee; this remainder, immediately on the death of either, becomes vested in possession in the survivor. The meaning of the rule under consideration is, therefore, that a contingent remainder must either vest as a remainder during the particular estate, or as an estate in possession at the determination thereof: and cannot remain in contingency after the latter period.

From this the important doctrine followed, that so long as a remainder was in contingency, it always required the *continuing* support of the particular freehold estate (*s*); so that if that estate came by any means to an end before the contingency happened, the remainder was altogether *defeated* (*t*); for before the happening of the contingency, there was no person entitled to take, or in whom the remainder could vest; and, by the rule under consideration, it could no longer exist as a contingent remainder, because the particular estate was determined. Thus if A. were tenant for life, with remainder to B.'s eldest son, then unborn, in tail; if A. died before the contingency

(*r*) 2 Bl. Com. 169.

(*s*) Colthirst *v.* Bejushin, Plowd. 25; Fearne, by Butler, p. 307, 9th ed.

(*t*) Purefoy *v.* Rogers, 2 Saund. 386, 387; 2 Bl. Com. 171; Fearne, ubi sup. p. 316.

happened, that is, before B. had a son, the remainder was absolutely gone: for the particular estate was determined before the remainder could vest (*u*). Nay, in one case, where A., tenant for life under a will, with remainder to his own eldest son in tail, died without issue born, but leaving his wife *enceinte* or big with child, and after his death a posthumous son was born, it was held that by the strict rule of law this son could not take the land by virtue of the remainder: for the particular estate had determined before there was any person actually in existence in whom the remainder could vest. This decision, however, was ultimately reversed in the House of Lords; and the law on this subject now depends on that judgment (which referred to the case of estates devised by will) and on a statute subsequently passed (10 & 11 Will. III. c. 16), which speaks of estates by marriage or other settlement, and enacts that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime; that is, the remainder is allowed to vest in them while yet in their mother's womb (*x*).

The remainder was defeated by the determination of the particular freehold estate before the contingency happened, even though that estate determined prematurely, and were destroyed by the voluntary act of the particular tenant himself (*y*). Thus, a tenant for life, with remainder to his unborn son in tail, remainder over to a stranger in fee, might, before a son was born, have destroyed the life

(*u*) 2 Bl. Com. 169.

(*x*) The case referred to in the text is that of Reeve *v.* Long (1 Salk. 228; 4 Mod. 282). It may be noticed that where a posthumous child takes by way of *remainder*, he is entitled to the intermediate property from the death of the parent; though, where a posthumous child takes by *descent*, divesting the estate of the supposed heir, he takes only from the time of his birth; (see 2 Saund. by Wms. 387 a; Thellusson *v.* Woodford, 11 Ves. 139; Goodtitle *v.* Newman, 3 Wils. 526; Christian's Bl. Com. vol. ii. p. 169.)

(*y*) Chudleigh's case, 1 Rep. 135 b; Archer's case, ibid. 66 b.

estate by a wrongful feoffment in fee, or have it to the person in ultimate remainder, so as to merge it in the fee: and in either case the contingent remainder to the son would have been defeated (*z*). [In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders, in whom there was vested an estate in remainder for the life of the tenant for life, to commence when the estate determined (*a*): and then, if his estate for life determined otherwise than by his death, for example, by wrongful alienation, or by surrender, as above supposed, the estate of the trustees for the residue of his natural life would then take effect; and become a particular estate in possession, sufficient to support the remainder, or successive remainders, depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and another eminent counsel, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who, before, were usually left at the mercy of the particular tenant for life; and when, after the Restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.]

When land was settled in the form here supposed, that is, by a limitation to the parent for life, and after his death to his first and other sons or children, in tail, and trustees were interposed to preserve the contingent remainders, this was called a *strict settlement.* The estate tail immediately expectant on the parent's life estate, was not only exempt from the danger of being defeated before the first son was born, but remained unalienable until he

(*z*) Fearne, by Butler, 317, 9th ed.; Purefoy *v.* Rogers, 2 Saund. 386, 387. As to the tortious operation of a feoffment, at common law, vide sup. p. 316.

(*a*) As to the nature of this remainder, see Parkhurst *v.* Smith, Willes, 338; 3 Atk. 138.

attained the age of twenty-one; at that period, however, as results from former explanations (*b*), he might, with the concurrence of his parent, if then living, or at his own pleasure, if his parent were dead, bar both his own issue and those in remainder or reversion, and convert his estate tail into a fee simple absolute; and, even without the concurrence of his parent, might in all cases bar his own issue, leaving the ulterior estates undisturbed. This state of the law as regards the position of a child to whom, before his birth, a remainder in tail has been limited, expectant on a precedent life estate limited to his parent, is still unaltered, though by the effect of a late statute, which we shall presently mention, the interposition of trustees to preserve contingent remainders is no longer necessary to his security.

To return, however, to our immediate subject, it may be further remarked, that, to support a contingent remainder, it was not, even at the common law, essential that the particular estate should be in actual possession; for, provided such an estate were in existence, it would suffice for that purpose, though it were reduced to a *right of entry* only (*c*). Thus, if there were an estate for life, with a contingent remainder over, and the tenant for life were disseised, that is, put out of his seisin or possession of the freehold by a stranger, there nevertheless resided an immediate right of entry in the disseisee; and that would have been sufficient to support the remainder (*d*).

The law was said to lean against contingent remainders, as compared with vested ones, on account of the liability of the former to be defeated; and therefore in a case of doubtful interpretation, it has been held that a remainder capable of being taken as vested, ought not to be construed as contingent (*e*). But the law relating to contingent

(*b*) Vide sup. p. 251.
(*c*) Archer's case, 1 Rep. 66 b, 67 a.
(*d*) Ibid.
(*e*) See Ives *v.* Legge, 3 T. R. 489, n.; Driver *v.* Frank, 3 Mau. & Sel. 37; Doe *d.* Pilkington *v.* Spratt, 5 Barn. & Adol. 731.

remainders has now undergone an alteration of a very important kind, by which much of the old learning, to which we have just had occasion to refer, has been displaced. For by 8 & 9 Vict. c. 106, s. 8, "a contingent "remainder existing at any time after the 31st day of "December, 1844, shall be,—and if created before the "passing of that Act, shall be deemed to have been,— "capable of taking effect, notwithstanding the determina- "tion by *forfeiture*, *surrender* or *merger*, of any preceding "estate of freehold, in the same manner, in all respects, "as if such determination had not happened" (*f*). And to this it may be added, that by an act further to amend the law as to contingent remainders, passed on the 2nd August, 1877 (40 & 41 Vict. c. 33), it has been provided, that every such remainder created by any instrument (including a will) executed after that date, which would have been valid as a springing or shifting use, or executory devise, or other executory limitation, had it not had a sufficient estate to support it as a contingent remainder, —shall, in the event of the particular estate determining before the contingent remainder vests,—be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise, or other executory limitation (*g*).

In connection also with the subject of contingent remainders, occurs that remarkable rule of construction so familiar in our books under the appellation of the *Rule in Shelley's case* (*h*).

(*f*) It is necessary also to advert here to 8 & 9 Vict. c. 106, s. 4, (vide sup. p. 316,) providing "that a "feoffment made after 1st October, "1845, shall not have any tortious "operation."

(*g*) The nature of "springing" and other executory uses is explained, post, c. XVIII.

(*h*) See the elaborate dissertation on Shelley's case in Fearne, by Butler, 28—208, 9th ed.; see, also, the observations on the rule by Mr. Hargrave, in his Law Tracts, and the argument of Mr. Justice Blackstone, in Perrin *v.* Blake, in the same work. The instances which call for its application are

This rule is propounded in Lord Coke's Reports in the following form—that wherever a man by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his *heirs* in fee or in tail, the word *heirs* is a word of *limitation*, and not of *purchase* (*i*). In other words, it is to be understood as expressing the quantity of estate which the party is to take, and not as conferring any distinct estate on the persons who may become his representatives.

This indeed is the *ordinary* force of the word *heirs;* for, as may be inferred from the former remarks on the subject of estates of inheritance, if land is given to a man and his heirs, he takes a fee simple (*j*); if to him and the heirs of his body, a fee tail (*k*); in which cases, the word plainly operates as a mere limitation of the quantity of his estate. But where land is given to A. B. for his life, and on his decease to his heirs, or to the heirs of his body; it might be supposed, from the doctrines we have been considering with respect to remainders, that this confers a separate estate on his representatives; and that he will take for his own life only, with contingent remainder to his heirs; or to the heirs of his body: according to the apparent purport of the grant. And such ulterior limitation would in fact be a contingent remainder to them, if the previous life estate had been limited not to A. himself, but to another person. By the effect, however, of the rule

very numerous; but they occur much more frequently where the limitation is by will, than where it is by deed. Bradley *v.* Cartwright, Law Rep., 2 C. P. 511, and Cooper *v.* Kynock, ib. 7 Ch. App. 398, may be consulted as recent cases in which this rule was discussed.

(*i*) Shelley's case, 1 Rep. 104 a. to the terms in which the rule is expressed, see Fearne, by Butler, p. 76, 9th ed. The rule would seem still to apply, though the ancestor's estate of freehold is of a nature that may determine in his lifetime; Brook's Estates, 76; Fearne, ubi sup. p. 29; Curtis *v.* Price, 12 Ves. 89.

(*j*) Vide sup. p. 237.

(*k*) Ib. p. 245.

which we are considering, the heirs or heirs of the body of A. will not take in remainder, (in the case supposed,) nor will A. himself take a mere life estate, but a remainder also in fee or tail; and as that remainder will absorb, according to the law of merger, his life interest, the result upon the whole conveyance will be to give him an *estate in fee* (or in *tail*, as the case may be) *in possession* (*l*). And upon the same principle, if another particular estate, by way of vested remainder upon A.'s life estate (for example, a life estate to B.), be interposed before the ulterior limitation to A.'s heirs, or the heirs of his body, that ulterior limitation will take effect in A. himself; but as a vested remainder only in fee or tail, because the intervening estate will in that case prevent a merger. If the estate interposed, indeed, be not a vested but a contingent remainder, A. will take (as in the case first supposed) the entire fee; for while the contingency is in suspense, there is nothing to prevent the consolidation of his life estate with the ulterior limitation to his heirs; yet he takes it *sub modo* only, that is to say, it will, (under the stat. 8 & 9 Vict. c. 106,) open and let in the intermediate estate when the contingency happens (*m*).

It is to be observed, that the interest which, by the effect of this rule, passes to the ancestor, is of a kind very different from that which would belong to him if the words were to receive their more obvious construction. According to the rule, he becomes, in the first case we have supposed, proprietor of the whole fee, which it is consequently in his power to aliene at his pleasure (subject, where the estate is in tail, to the ordinary restrictions); and in the two other cases, his interest is of the same description, except as regards the intervening estate: while, on the other hand, if he took an estate for life only (though with remainder to his heirs), he could aliene for

(*l*) Vide sup. pp. 316, 318, 333.

(*m*) Fearne, by Butler, p. 29; Lewis Bowles's case, 11 Rep. 79 b.

no longer period than his own life, and he would have no control over the inheritance.

With respect to the *reason* of the rule, it is involved in much obscurity (*n*). But according to the prevalent opinion, it was established with a view to the protection of the feudal lord, who would have been defrauded, it is said, of his wardship and other perquisites, if the heir had been allowed to take by way of remainder, and not by hereditary succession. And the argument by which it is best supported seems to be in substance as follows: that where by the same conveyance land is given to a person for his life, and afterwards to the heirs of the same person, it is reasonable to presume that he is himself intended in both cases as the sole object of the gift; and that no benefit is designed to his heirs, except what they may derive by operation of law from his own antecedent seisin.

We shall conclude this chapter with notice of two legislative provisions,—one intended for the protection of those who are possessed of *reversionary interests*, the other to ascertain the rule which is to govern the disposal by sale of such interests, whether in real or personal estate. 1. [By 6 Anne, c. 20, in order to assist such persons as have any estate in remainder, reversion, or expectancy after the death of others, against fraudulent concealment of their deaths, it is enacted that all persons on whose lives any lands or tenements are holden shall (upon application to the court and order made thereupon) once in every year, if required, be produced to the court or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be

(*n*) See Fearne, by Butler, p. 83; argument of Mr. Justice Blackstone in the case of Perrin *v.* Blake in Hargrave's Law Tracts; Hist. Eng. Law, by Reeves, vol. iii. p. 8.

[living (*o*).] 2. By 31 Vict. c. 4, it has been provided that no purchase of any reversionary interests, made *bonâ fide* and without fraud or unfair dealing, shall hereafter be opened or set aside merely on the ground of *under-value* —a circumstance which, as the law was previously administered in the courts of equity, was in some cases held to vacate the transaction.

(*o*) As to this statute, see Ex parte Grant, 6 Ves. 512; Ex parte Whalley, 4 Russ. 561; Re Isaac, 4 Myl. & Cr. 11; Re Lingen, 12 Sim. 104.

CHAPTER VIII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

[We come now to treat of estates, with respect to the number and connection of their owners, the tenants who occupy and hold them (*a*). And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or in expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate: and therefore we may make the same observations here that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning them, since all estates are supposed to be of this sort, unless the contrary is expressed; and in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. We shall therefore proceed to consider the other three species of estates, in which there is always a plurality of tenants.]

All the three last-mentioned species of estate have this common characteristic,—that the tenants hold *pro indiviso*,

(*a*) Vide sup. p. 229.

or promiscuously (*b*). So that one person is not seised or possessed exclusively of one acre, and another person of another, (for then they would be tenants in severalty,) but the interest and possession of each extend to every specific portion of the whole land of which they are joint-tenants, coparceners, or tenants in common. And accordingly, though only one of them should happen to be in actual possession, yet his possession is considered for many purposes as that of all (*c*). But in many points of view these different species of estate are materially distinguishable from each other in their character and properties, and it will be necessary therefore to consider them separately and in succession.

II. An estate then in *joint-tenancy* is where an estate is acquired by two or more persons in the same land, by the same title (not being a title by descent), and at the same period; and without any limitation by words importing that they are to take in distinct shares (*d*). Thus, if there be a conveyance of lands to A. and B., without more, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, this makes them joint-tenants of the fee. [The estate so acquired is called an estate in joint-tenancy (*e*), and sometimes an estate in *jointure*, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term *jointure* is usually confined to that estate, which, by

(*b*) Co. Litt. 189 a, 190 b, 163 a.

(*c*) See Doe *v.* Taylor, 5 Barn. & Adol. 583; Ford *v.* Grey, 1 Salk. 285; Doe *v.* Keen, 7 T. R. 386; Doe *v.* Pearson, 6 East, 173. But by the Limitation Act, 3 & 4 Will. 4, c. 27, s. 12, if one or more of several persons entitled as coparceners, joint-tenants, or tenants in common, shall have been in the possession of the entirety, or more than his undivided share, or shares for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares, such possession shall not be deemed to have been the possession of such last-mentioned person or persons or any of them.

(*d*) As to this estate, see Co. Litt. 180 a—188 b.

(*e*) Litt. s. 277.

[virtue of the statute 27 Hen. VIII. c. 10, is sometimes vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower (*f*).

This estate of joint-tenancy has several conditions and properties, which require to be distinctly pointed out before a just conception of its nature can be attained.

1. Among joint-tenants there is a *unity of title* (*g*), that is, their estate must be created by one and the same act, whether legal or illegal,—as by one and the same grant, or by one and the same disseisin (*h*).] 2. The estate of joint-tenants *vests in them at one and the same period* (*i*). Thus, if an estate be granted to J. S. for life, with remainder to A. and the eldest son of B. (B. having no son at the time), and their heirs, A. does not take in joint-tenancy with B.'s eldest son; because A. takes a vested remainder in a moiety immediately on the execution of the conveyance, while the remainder in the other moiety does not vest until a son is born to B.; nor at all if J. S. dies first. And even if a son is born to B. in J. S.'s life-time, still A. had up to that period no joint interest with him; and the tenancy, not being *ab initio* a joint-tenancy, cannot become so afterwards. On the other hand, in a case of remainder to A. and B. and their heirs, after a previous life estate, they take in joint-tenancy, because they both take at once a vested remainder. 3. Among joint-tenants there is also a *similarity of interest* as regards the quantity of estate. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail (*k*). Yet there may be joint-tenants as

(*f*) Vide sup. pp. 272 et seq.

(*g*) 2 Bl. Com. 181.

(*h*) Litt. s. 278.

(*i*) Bl. Com. ubi sup.; Co. Litt. 188 a. But with respect to the applicability of this doctrine to estates raised by way of *use* or *devise* (as to which vide post, bk. II. pt. I. cc. XVIII., XX.), see Fearne, by Butler, 312, 9th ed.; Co. Litt. by Harg. 188 a, n. (13).

(*k*) Co. Litt. ubi sup.

to a portion of the fee, with a several interest in one or more of them as to the residue. Thus, if land be granted to A. and B. for their lives, and to the heirs of A.; here A. and B. are joint-tenants of the freehold during their joint lives, and A. has a several inheritance in fee simple; or if land be given to A. and B., and the heirs of the body of A.; here both have a joint estate for life, and A. has a several inheritance in tail (*l*). 4. There is an *entirety* and *equality of interest* among the tenants; for while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the *whole*. And, on the other hand, though the entirety ceases for the purpose of alienation, every co-tenant being entitled (if he thinks proper) separately to transfer his own share, yet the equality remains; for each is capable of conveying an equal share with the rest.

This combination of entirety of interest with the power of transferring in equal shares, is expressed by the antient law maxim, that every joint-tenant is seised *per my et per tout* (*m*). And this is considered as an essential charac-

Litt. s. 285. Blackstone's expression (vol. ii. p. 181) is, that "A. has the *remainder* in severalty" in these cases. But Littleton says, "one hath a freehold and the other a fee-simple," and Lord Coke, that "they are joint tenants for "life, and the fee-simple or estate "tail is in one of them;" and though he afterwards speaks of "him in remainder," his remarks show that it is not a remainder properly so called; and, that though a joint-tenancy for life subsists with all the usual incidents, yet the estate of the joint tenant, who has the fee, is for many purposes (particularly that of alienation) an entire inheritance, not broken into a particular estate and remainder thereon. (Co. Litt. 184 b, and note 2, by Harg.; Wiscot's case, 2 Rep. 60 b.) See also Forrest *v.* Whiteway, 3 Exch. 367.

(*m*) Blackstone (vol. ii. p. 182) gives, as the meaning of this expression, that each has "the entire possession, as well of every parcel as of the whole," and in this he follows the words of Littleton, s. 288. The expression, however, seems more properly to import that they are all jointly seised of the whole, with a right to transfer in equal shares, as explained in the text. Accordingly, in commenting on the words, *per my et per tout*, Lord Coke (citing Bracton) remarks, "*Et sic totum tenet, et nihil tenet, scil. totum conjunctim et nihil per se separatim.*" "And "albeit they are so seised, as

teristic of a joint estate; and therefore if an estate in fee be given to a man and his wife, they are not properly joint-tenants, but are said to be tenants by *entireties;* for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my;* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor (*n*). And so if a joint estate in land be conveyed to a husband and wife, and to a third person, the husband and wife take a moiety, and the third person the other moiety, in the same manner as if the grant had been to only two persons (*o*).

[From the entirety of interest in each of the co-tenants results the most remarkable incident or consequence of a joint estate, viz., that it is subject to *survivorship.* For when two or more persons are seised of a joint estate of freehold, or are jointly possessed of any chattel interest in lands, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a freehold only, or even a less estate (*p*). This is the natural and regular consequence of the union and entirety of their interest. One has not a distinct moiety from the other, but while the joint-tenancy continues each joint-tenant has a con-

"for example, where there be "two joint-tenants in fee, yet to "divers purposes each of them "hath but a right to a moiety, as "to enfeoff, give, or demise, or to "forfeit, &c." (Co. Litt. 186 a.) As to the meaning of the expression *per my et per tout*, the reader is also referred to a learned note by Mr. Serjeant Manning, Murray *v.* Hall, 7 C. B. 455, n. (*a*).

(*n*) Litt. s. 665; Co. Litt. 187 b; Bro. Abr. t. *cui in vitâ*, 8; 1 Prest. Est. 131; and see Back *v.* Andrew, 2 Vern. 120; Purefoy *v.* Rogers, 2 Lev. 39; Greneley's case, 8 Rep. 71 b; Beaumont's case, 9 Rep. 138; Doe *v.* Parratt, 5 T. R. 652.

(*o*) Litt. s. 291. But if a grant be made to a husband and wife, expressly to hold as *tenants in common*, they hold accordingly. (Co. Litt. 187 b.) And see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(*p*) Litt. ss. 280, 281.

[current interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements, for that would be to deprive the survivor of the right which he has in all and every part. As, therefore, the survivor's original interest in the whole still remains, and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.]

The right of survivorship is called by our antient authors the *jus accrescendi*, because the right, upon the death of one joint-tenant, accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstitibus, de personâ in personam, usque ad ultimam superstitem*" (*q*). And the rule is that *jus accrescendi præfertur oneribus* (*r*); so that no dower or curtesy can be claimed out of a joint estate (*s*). Indeed even where one of the joint-tenants alienes his share (which discharges it from any claim of his co-tenant in respect of survivorship), yet the wife of the alienor shall not be entitled to her dower (*t*); the reason of which seems to be, that the land never was in his seisin, except as subject to the paramount claim of the survivor; and therefore there

(*q*) Bracton, l. 4, tr. 3, c. 9, s. 3; Fleta, l. 3, c. 4, s. 2. It may deserve remark, that in English law there is no presumption as to survivorship from age or sex among persons whose death happened by one and the same cause, as by shipwreck. See Wing *v.* Angrave, 8 H. of L. Cas. 183.

(*r*) Co. Litt. 185.

(*s*) As to *dower* and *curtesy*, vide sup. pp. 264, 267.

(*t*) Co. Litt. 31 b, and n. 4, by Harg.

was no such sole seisin as that the dower could arise out of (*u*).

The remaining subject for our consideration is, how an estate in joint-tenancy may be dissolved or destroyed. And this may be done:—1. *By partition.* Thus, if two joint-tenants agree to part their lands, and to hold them in severalty, the effect thereof is to make them no longer joint-tenants, for they no longer hold promiscuously; and it follows that the right of survivorship, also, is by such separation destroyed (*v*). But with regard to such a transaction, the provision of 8 & 9 Vict. c. 106, s. 3, is to be borne in mind, viz., that a partition of any tenements or hereditaments (not being copyhold) made after the 1st October, 1845, shall be void at law unless made by *deed.* By the common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do (*x*); for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint-tenants were, in case of refusal by any of them, made compellable by *writ of partition* to divide their lands; and though this writ, together with the other antient forms of real action, was abolished by 3 & 4 Will. IV. c. 27, s. 36, joint-tenants are still compellable by action to make partition. For the antient proceeding by way of a real action in the Common Pleas became in practice, at an early period, superseded by proceedings in *equity*, praying the same relief (*y*); and this course is that which is now adopted in order to compel a partition (*z*). 2. [*The jointure may be destroyed by alien-*

(*u*) As to the necessity for the husband's seisin, vide sup. pp. 269, 270.

(*v*) Co. Litt. 188 a, 193 a. Litt. s. 290.

(*y*) Co. Litt. by Harg. 169 a, n. (2); 1 Fonbl. Tr. Eq. 18. As to the partition of *copyhold* and *customary* estates see 4 & 5 Vict. c. 35, s. 85.

(*z*) The subject of partition is

[*ation without partition.* As if one joint-tenant alienes and conveys his estate to a third person; here the joint-tenancy is severed, and turned into tenancy in common; for the grantee and the remaining joint-tenant hold by different titles,—one derived from the original, the other from the subsequent, grantor; though, till partition made, the undivided tenancy continues (*a*). And so if one of two joint-tenants releases his share to the other, the joint-tenancy is dissolved, and turned to an estate in severalty (*b*). But a devise of one's share by will is no severance of the jointure, the *jus accrescendi* being preferred *ultimæ voluntati* (*c*): for no testament takes effect till after the death of the testator; and by such death, the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority to the other, is already vested (*d*). 3. *The jointure may also be destroyed by an accession of interest.* Thus, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure, for such event renders their interests dissimilar as regards the quantity of estate (*e*); though, if an estate is originally limited to two for life, and after to

chiefly regulated by 31 & 32 Vict. c. 40 (the Partition Act, 1868), amended by 39 & 40 Vict. c. 17, which among other provisions give power to the court to order a sale and distribution of the proceeds, in place of a division of the property, where such a course is desirable. And where the property does not exceed a certain amount in value, the proceedings may be in the *county* court of the district. The cases which have arisen, on various points connected with partition, are numerous. See, amongst others, Landell *v.* Baker, Law Rep., 6 Eq. Ca. 268; Osborn *v.* Osborn, ib. 338; Miller *v.* Marriott, ib. 7 Eq. Ca 1; Lys *v.* Lys, ib. 126; Slade *v.* Barlow, ib. 296; Peters *v.* Bacon, ib. 8 Eq. Ca. 125; Silver *v.* Udall, ib. 9 Eq. Ca. 227; Evans *v.* Bagshaw, ib. 5 Ch. App. 340; Wilkinson *v.* Joberns, ib. 16 Eq. Ca. 14; Grove *v.* Comyn, ib. 18 Eq. Ca. 387; Drinkwater *v.* Ratcliffe, ib. 20 Eq. Ca. 528; Gilbert *v.* Smith, 8 Ch. D. 548; 11 Ch. D. 78; Burnell *v.* Burnell, 11 Ch. D. 213.

(*a*) Litt. s. 292.

(*b*) See Avery *v.* Cheslyn, 3 Ad. & El. 75.

(*c*) Co. Litt. 185 b. And see Swift *v.* Roberts, 3 Burr. 1488; Ambl. 617.

(*d*) Litt. s. 287; 3 Burr. 1488; Co. Litt. ubi sup.

(*e*) Cro. Eliz. 470.

[the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate (*g*).

It is proper to add, that whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it (*h*). Yet, if one of three joint-tenants alienes his share, the two remaining tenants, as between themselves, still hold their parts by joint-tenancy and survivorship (*i*); and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still *inter se* held in jointure (*k*).

In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint estate: as if there be two joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for his own life and the life of his companion, now each has an estate in a moiety only, for his own life merely; and on the death of either, the reversioner shall enter on his moiety (*l*).

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons (*m*). It arises either by common law or by particular custom. By common law: as where a person seised in fee simple or in fee tail dies, and his next heirs are two or

(*g*) Wiscot's case, 2 Rep. 60; Co. Litt. 182 b.

(*h*) "*Nihil de re accrescit ei, qui nihil in re quando jus accresceret* ». Litt. 188 a.

(*i*) Litt. s. 294.

(*k*) Ib. s. 304.

(*l*) 1 Jones, 55; Co. Litt. 191 a.

(*m*) As to this estate, see Co. Litt. 163 a—180 a.

[more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown, when we treat of descents hereafter; and these co-heirs are then called *coparceners*, or, for brevity, *parceners* only (*n*); though in some points of view the law considers them as together making only one heir (*o*). Parceners by particular custom are where lands descend, as in gavelkind, to all the *males* in equal degree, as sons, brothers, uncles, &c. (*p*).]

An estate in coparcenary resembles, in some respects, that in joint-tenancy, there being the same unity of title and similarity of interest. But in the following respects they materially differ:—1. Parceners always claim by *descent*, whereas joint-tenants always claim by *the act of parties*. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants (*q*); and hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no *entirety of interest* among coparceners. They are properly entitled each to a distinct share (*r*), and of course there is no *jus accrescendi* or survivorship between them, for each part descends severally to their respective heirs, though the undivided tenancy continues. And as long as the lands continue in a course of descent, and are held promiscuously, so long are the tenants therein, whether male or female, called parceners. 3. Though the interest of coparceners accrue by the same title, yet *they may accrue at different periods*. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are

(*n*) Litt. ss. 241, 242.
(*o*) Co. Litt. 163 b, 164 a; Vin. Ab. Parceners (Q); and see R. *v.* Bonsall, 3 B. & C. 173.
(*p*) Litt. s. 265.
(*q*) Ib. s. 254.
(*r*) Co. Litt. 163, 164.

dead, their two heirs, are still parceners (*s*); the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 4. And lastly, though persons related in equal degree to the ancestor are entitled in equal shares, yet as their heirs will represent them, or stand in their place, there is no necessary *equality of interest* among parceners. Thus, if a man die leaving four grand-daughters, three of them the issue of an elder daughter, and one of a younger, all four shall inherit; but the daughter of the younger shall take as much as all the other three (*t*).

[With respect to an estate in coparcenary, the following rule deserves notice: that if one of two or more sisters, to whom lands descended in coparcenary, held an estate which had been given to her in *frankmarriage* (*u*) by the same ancestor from whom the lands thus descended to her, she could not take her share of them without first adding to them her estate in frankmarriage, in order that the whole property might be equally divided between all the sisters (*x*). This mode of division was known in the law of the Lombards, which directs the woman so preferred in marriage and claiming her share of the inheritance, "*mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum*" (*y*). With us it is denominated bringing those lands into *hotchpot* (*z*); which term shall be explained in the very words of Littleton (*a*); "It seemeth that this word, *hotch-*"*pot*, is in English a pudding; for in a pudding is not "commonly put one thing alone, but one thing with other "things together." By this housewifely metaphor our ancestors meant to inform us that the lands, both those given in frankmarriage and those descending in fee simple, should be mixed and blended together, and then divided

(*s*) Co. Litt. 164, 174.
(*t*) Ib. 164 b.
(*u*) Vide sup. p. 244, n.
(*x*) Bracton, l. 2, c. 34; Litt. ss. 266—273.
(*y*) L. 2, t. 14, c. 15.
(*z*) Britton, c. 72.
(*a*) Litt. s. 267.

[in equal portions among all the daughters (*b*). But this was left to the choice of the donee in frankmarriage; and if she did not choose to put her lands into hotchpot she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her sisters. The law of hotchpot took place then only, when the other lands descending from the ancestor were fee simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotchpot (*c*). And the reason is, because lands descending in fee simple are distributed by the policy of the law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more; but lands descending in tail are not distributed by the operation of the law, but by the designation of the giver, *per formam doni;* it matters not, therefore, how unequal this distribution may be. Also, no lands but such as are given in frankmarriage, shall be brought into hotchpot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion (*d*). And, therefore, as gifts in frankmarriage are fallen into disuse, the law of hotchpot would hardly have been worth notice, had not this method of division been revived and copied by the statutes "for the distribution of personal estates," which we shall hereafter consider at large (*e*).

The modes of dissolving an estate in coparcenary are as follows:—1. *By partition* (*f*). Parceners are so called, saith Littleton, because they may be constrained to make

Litt. s. 268.

(*c*) Ib. s. 274.

(*d*) Ib. s. 275.

(*e*) As to the Statutes of Distribution, vide post, bk. II. pt. II. c. VII.

(*f*) Though the partition dissolves the coparcenary, the parceners are still *in* by *descent*, Doe *d.* Crosthwaite *v.* Dixon, 5 Ad. & El. 834.

["partition" (*g*); and he mentions many methods of making it, four of which are by consent and one by compulsion (*h*). The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second method is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age, or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, upon the first turn the eldest and her issue, nay, her husband, or her assigns, shall present alone, before the younger, to whom the next turn will in that case belong (*i*). And the reason given is, that the former privilege, of priority in choice upon a division, arises from an act of the parceners, the agreement to make partition; and, therefore, is merely personal: the latter, of presenting to the living, arises from the act of the law: and is annexed not only to the person of the eldest, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio.* The fourth method is, where the sisters agree to cast lots for their shares.] And these are the methods by consent; with regard to all of which, however, the enactment of 8 & 9 Vict. c. 106, s. 3, which requires that a partition, in order to be effectual, must now be *by deed*, should be borne in mind (*k*). Partition by compulsion (the other method mentioned by Littleton) used at the common law to be, where one or more parceners sued out a *writ of partition* against the others; but that writ being now abolished (*l*), partition of an estate held in

Litt. s. 241.

(*h*) Ib. ss. 243—264.

(*i*) Co. Litt. 166 b, and see note (2) by Harg.; Walker's case, 3 Rep. 22; Buller *v.* Bishop of Exeter, 1 Ves. sen. 340.

(*k*) Vide sup. p. 344.

(*l*) Ibid.

coparcenary can at present be compelled only by a decree in equity, as in the case of a joint-tenancy (*m*). It is, however, to be noticed that there are some things which are in their nature impartible. The mansion-house, for example, and certain hereditaments of an incorporeal kind, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson (*n*).

Besides the method of partition, the estate in coparcenary may be dissolved, 2, *by the alienation of one of the parties*, which destroys the unity of title; or, 3, *by the whole at last descending to and vesting in a single person*, which brings it to an estate in severalty (*o*).

IV. A *tenancy in common* is, where two or more hold the same land, with interests accruing under different titles; or accruing under the same title (other than *descent*), but at different periods (*p*); or conferred by words of limitation, importing that the grantees are to take in distinct shares (*q*).

In this tenancy there is not necessarily any *unity of title;* for one may hold by descent and the other by purchase, or the one by purchase from A. and the other by purchase from B.; nor any *unity in the time of vesting*, for the one's estate may have vested fifty years ago, and the other's but yesterday; nor any necessary *similarity* or

(*m*) The powers of the court in regard to decreeing a sale instead of dividing the property, are the same as in the case of a joint tenancy as referred to, sup. p. 344, n. (*z*).

(*n*) Co. Litt. 164 b, 165 a.

(*o*) 2 Bl. Com. 191; Doe *v.* Dixon, 5 Ad. & El. 839.

(*p*) Where several parties take under the same title *by descent*, accruing at different periods, they hold in coparcenary. Vide sup. pp. 346, 347.

(*q*) As to tenants in common, see Co. Litt. 188 b—201 a; Murray *v.* Hall, 7 C. B. 441.

equality of interest, for one tenant in common may hold in fee-simple, and the other in tail or for life; one may be entitled to two-thirds, and the other to one-third. Nor is there any *entirety* of interest, for each is seised or possessed of a distinct (though undivided) share; from which also it follows that there is no *survivorship* (*r*). The union consists only in this, that they hold the same land promiscuously.

[Tenancy in common may be created by the destruction of an estate held in joint-tenancy or of one held in coparcenary, or by special limitation in a deed. By destruction is here meant not such a destruction as brings the joint estate into two or more estates in severalty, but such as puts an end only to the jointure or coparcenary: as if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation (*s*). So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances (*t*). If one of two parceners alienes, the alienee and the remaining parcener are tenants in common (*u*); because they hold by different titles,—the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life estate, but they shall have several inheritances (*x*); because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten (*y*): and in this, and the like cases, their

(*r*) Land, however, may be given to two persons in such manner as to make them tenants in common with benefit of survivorship. (Doe *v.* Abey, 1 Mau. & Sel. 428.)

(*s*) Litt. s. 292.

(*t*) Ib. s. 295.

(*u*) Ib. s. 309.

(*x*) Doe *v.* Green, 1 H. & H. 314; vide sup. p. 340.

(*y*) Litt. s. 283.

[issues shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B.; and those, too, not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the undivided tenancy continues, it is turned into a tenancy in common.]

A tenancy in common may also be created by express limitation in a conveyance: but here care must be taken to insert words implying that the grantees are to take distinct, though undivided, shares; for a grant without such words would give a joint estate. And it is laid down in our books that the common law, in its rules of construction, favoured joint-tenancy rather than tenancy in common (*z*); because the divisible services issuing from land (as, for example, rent,) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy,—as they must necessarily be upon a tenancy in common. Yet where land was given to two, to be holden the one moiety to one, and the other moiety to the other, this was an estate in common (*a*); and, where one granted to another *half* his land, the grantor and grantee were also tenants in common (*b*);—because, as has been before observed, joint-tenants do not take by distinct halves or moieties (*c*); and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible that they should take a joint interest in the whole of the tenements. But, on the other hand, an estate given, in a conveyance *inter vivos* at common law, to A. and B. *equally to be divided* between them, was said to be a joint-tenancy (*d*), as it implies no more than what the law has annexed to that estate, viz. divisibility (*e*). Such a limitation, however, in a will or in a conveyance founded on the statute of uses, (of which we shall have occasion to treat hereafter,) is certainly

(*z*) Fisher *v.* Wigg, Salk. 392.
(*a*) Litt. s. 298.
(*b*) Ib. s. 299.
(*c*) Vide sup. p. 340.
(*d*) 1 Eq. Cas. Abr. 291.
(*e*) Fisher *v.* Wigg, 1 P. Wms. 17.

a tenancy in common (*f*); for if the tendency of the antient law was to favour a joint-tenancy, the leaning in later times—and particularly of equity—has been the other way (*g*); the right of survivorship being often inconvenient and harsh in its effects. And therefore in wills and the conveyances above referred to—both of which came into use in comparatively modern times, and with regard to which a more liberal construction is in some respects allowed, than in the case of common law conveyances—a tenancy in common will be created by words which at common law would operate as a limitation in joint-tenancy.

We may take this opportunity of remarking, that when lands are given to two or more as tenants in common, it frequently happens that a particular estate is limited to each of the grantees in his share, with remainder over to the other or others of them—as if a man give lands to his two children as tenants in common in tail, and direct that upon failure of the issue of one of them his share shall go over to the other in tail, and *vice versâ*. Such ulterior estates as these are called *cross remainders*, because each of the grantees has reciprocally a remainder in the share of the other; and it is a rule respecting them, that in a *deed* they can be given only by express limitation, and shall never be implied (*h*); though it is otherwise with respect to *wills*, which are here, again, expounded more liberally, with a view to the presumable intent of the donor. Hence in these, cross-remainders may be raised not only by actual limitation, but by any expression from which the design to create them can reasonably be inferred (*i*).

(*f*) See Co. Litt. by Harg. 190 b, n. (4); 1 Sand. Uses, 126; Ratcliffe's case, 3 Rep. 59 b; 1 Ventr. 32; Goodtitle *v.* Stokes, 1 Wils. 341.

See Joliffe *v.* East, 3 Bro. C. C. 25; Fisher *v.* Wigg, 1 P. Wms. 14.

(*h*) 1 Saund. by Wms. 185, n. (6); Cole *v.* Levingston, 1 Vent. 224; Doe *v.* Worsley, 1 East, 416.

(*i*) A learned disquisition on the

A tenancy in common may be dissolved, in the first place, *by partition;* for tenants in common, like joint-tenants, were compellable by the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32 (though not at common law), to divide their lands by writ of partition (*k*); and since the abolition of that writ, they may be driven to a partition by means of proceedings in equity (*l*). They may also effect a partition by mutual agreement without having recourse to the court, though by 8 & 9 Vict. c. 106, s. 3, it is now made essential that such partition shall be by *deed* (*m*). A dissolution of the common tenancy may also be brought about *by uniting all the titles and interests in the estate held in common in one tenant*, by purchase or otherwise, which brings the whole to one severalty.

nature of cross-remainders will be found in 1 Prest. Est. 94, 115; and see Co. Litt. 195 b, n. (1), by Butler.

(*k*) Vide sup. p. 344.

(*l*) Vide sup. p. 344, n. The provisions mentioned there apply to the partition of an estate, whether joint or held in common. It may be noticed here that partitions may also be effected, in some cases, by the orders of the *Inclosure Commissioners*, as to whom vide post, cap. XXXIII.

(*m*) Vide sup. p. 344.

CHAPTER IX.

OF USES AND TRUSTS.

THE modes of ownership hitherto considered all belong to the division of *legal* estates, to which our attention was in the first instance to be directed (*a*). And we may also remark of them, that they constitute the *primary* and *proper* forms of property in land: having been known in this country from the earliest era in the history of the Anglo-Norman jurisprudence, while all others are of considerably later introduction. But it is now time to take notice of those of the *equitable* kind; which, in relation to the former, are not only of posterior but of derivative origin, and proportionally more complex and artificial in their character: though unmixed, on the other hand, with those principles of feudal tenure fundamentally inherent, as we have seen, in the legal or common law estates.

The only example of equitable estate to which we have hitherto had occasion to refer, is that which resides in a person who, having conveyed his land by way of mortgage, is still entitled to the equity of redemption (*b*). But other interests of a various and somewhat intricate nature remain to be examined, which are embraced under the general appellation of *Uses* and *Trusts*.

Uses and trusts were in their origin closely united, but not identical (*c*). A *trust* was the confidence reposed by

(*a*) Vide sup. p. 230.

(*b*) Vide sup. p. 304. An equity of redemption is said to be *a title in equity* and not merely a trust; 1 Sand. Uses, p. 203; Plunket *v.* Penson, 2 Atk. 290.

(*c*) As to the manner of the introduction of uses into our law,

one man in another when he invested him with the nominal ownership of property, to be dealt with in some particular manner, or held for some particular person or purpose pointed out. If the trust was of a certain description, viz., to hold land for the benefit of another person, generally, and to let him receive the profits; the sort of interest or right which consequently attached to the latter person was called a *use*, to distinguish it from the nominal ownership or estate of the *trustee* (*d*).

[The general idea of a use or trust answered more to the *fidei commissum* than to the *usus fructus* of the civil law (*e*); which latter was the temporary right of using a thing without having the ultimate property or full dominion of the substance (*f*): but the *fidei commissum* (which usually was created by will) was the disposal of an inheritance to one in confidence that he should convey it, or dispose of the profits, at the will of another (*g*). The right of the latter, was originally considered in the Roman law as *jus precarium* (*h*)—that is, one for which the remedy was only by entreaty or request; but by sub-

vide Hist. Eng. Law, by Reeves, vol. iii. p. 364, vol. iv. pp. 340, 516, 520; Co. Litt. by Butler, 271 b, n. (1), 290 b, n. (1).

(*d*) The books are rather vague in their account of the original meaning of these terms. Blackstone says that "Uses and trusts "were in their original of a nature "very similar, or rather exactly "the same" (vol. ii. p. 327). There can be no doubt, however, that there might be "trusts" which involved no "uses," in the proper meaning of that term. Thus Lord Bacon expressly distinguishes a *use* from a "special" or "transitory" *trust*.—(Bac. Read. Us.) Again, a "*trust*" was referable rather to the person in whom the confidence was reposed, while a "use" was rather referable to the person for whose benefit it was reposed. Thus it is said by Ld. Ch. Baron Gilbert, "That a use is the equitable right to "have the profit of lands, the legal "estate whereof is in the feoffee, "only to the trust and confidence "reposed in him."—(Gilb. Uses, ed. by Sugd. 374.) And again Ld. Bacon remarks, "For a trust, "*which is the way to a use*, it is "exceedingly well defined by a "civilian of great understanding, "—*Fides est obligatio conscientiæ "unius ad intentionem alterius.*"—(Bac. Read. Uses.)

(*e*) Gilb. Uses, by Sugd. 3, (n.).

(*f*) Ff. 7, l. 1.

(*g*) Inst. 2, t. 23, ss. 1, 2.

(*h*) 1 Cruise, Dig. 394.

[sequent institution it acquired a different character (*i*). It then became *jus fiduciarium*, and entitled to a remedy from a court of justice, and it was the business of a particular magistrate, the *prætor fideicommissarius*, to enforce the observance of these confidences (*k*).]

This notion of a use was transplanted into England from the civil law, about the close of the reign of Edward the third (*l*); and by the means of the foreign ecclesiastics, who introduced it to evade the statutes of mortmain. To explain this, we must remark that the religious houses to which these clergy belonged, fell under the legal description of *corporations;* a species of social institution on which we shall have occasion to dilate hereafter, and of which at present we shall only say, that they consist either of collective bodies of men, or of single individuals —the first called corporations *aggregate*, the second, corporations *sole*,—to whom the law allows an artificial, distinct from their natural, personality; and who possess, as persons corporate, the character of perpetuity: their existence being constantly maintained by the succession of new individuals in the place of those who die, or are removed (*m*). The lands belonging to corporations were consequently said to be *in mortuâ manu*, or in *mortmain*, because they produced no advantage to the feudal lord by way of escheat or otherwise (*n*) : and therefore, by the policy of the antient law, corporations were prohibited from the purchase of land, unless a licence in mortmain (as it was called) was obtained for the purpose. This principle was enforced by a variety of statutes, called the statutes of mortmain, which the clergy (*scil.* the lawyers) of the day were constantly exerting their ingenuity to evade. One of their expedients was to obtain grants of land, not to their religious houses directly, but to some person to hold to the *use* of such religious houses. A gift of this kind conferred

(*i*) 1 Cruise, Dig. 395.
(*k*) Inst. 2, tit. 23, s. 1.
(*l*) 1 Sand. Uses, p. 17.
(*m*) See further as to corporations, bk. IV. pt. III. c. I.
(*n*) Co. Litt. 2 b.

estate or interest whatever, in contemplation of law, those whose benefit was designed; for the principle of the feudal tenure was to look no further than to the actual and ostensible tenant, and to consider him alone as the proprietor (*o*). The use, therefore, declared upon such a gift, being in the view of the ordinary courts of justice, a non-entity, escaped the operation of the statutes of mortmain. On the other hand, it did not remain without protection: for the clerical chancellors of those days maintained the doctrine that such gifts, though not effectual in the ordinary courts of law, were binding in conscience; and ought, like the *fideicommissa* of the Romans, to be enforced. And as these were subjected by the imperial institutions to the jurisdiction of a particular magistrate, the prætor, so the chancellors claimed the right of compelling the performance of the trusts in question in their Court of Chancery; a tribunal which administered justice upon the principles of *equity*, in contradistinction to the common law of the realm (*p*).

As regards the corporate bodies or religious houses themselves, indeed, this evasive contrivance of uses proved to be of little avail; being crushed in its infancy by the statute 15 Rich. II. c. 5, which enacted that, for the future, uses should be subject to the statute of mortmain, and forfeitable like the lands themselves, unless the licence of the crown were duly obtained. Yet the idea being once introduced, was afterwards applied to purposes not contemplated by its inventors, and took root in our system of jurisprudence; being chiefly recommended by two considerations—first, that uses were, as to the manner of their creation and transfer, and the modifications of interest to which they might be subject, free from the restrictive rules which applied to the common law estates: secondly, that they were not, in general, liable, like these estates, to

(*o*) 1 Cruise, Dig. 402.

(*p*) Vide sup. p. 81; 3 Bl. Com. 51; Hist. Eng. Law, by Reeves, vol. iii. p. 192.

forfeiture (*q*), and originally not even to forfeiture for treason (*r*). [And owing to this latter circumstance in particular, it happened that, during our long wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had of securing their estates from forfeiture when each of the contending parties, as they became uppermost, alternately attainted the other. And about the reign of Edward the fourth, before whose time Lord Bacon remarks that there are not six cases to be found relating to the doctrine of uses, the courts of equity began to reduce them to something of a regular system (*s*).]

With respect to the kinds of property that might be the subject of a use, we may observe, in general, that all corporeal hereditaments, whether in possession, remainder, or reversion;—and many that are incorporeal, for example, rents and advowsons,—might be granted to a use; but not those of which the use was inseparable from the possession or *quæ ipso usu consumuntur*, as ways, commons, and the like (*t*).

The manner in which a use was commonly created was as follows. The owner or actual tenant of the land, conveyed it by feoffment, upon the trust or confidence, which often rested upon merely oral agreement (*u*), that the feoffee should hold the land to the use of some third person, or it might be to the use of the feoffor himself (*x*). The effect of this transaction (as already in part explained) was, that the legal seisin or feudal tenancy of the land became severed from the substantial and beneficial ownership or use; the former being vested in the trustee, otherwise called *feoffee to uses*, the latter, in the person to whose

(*q*) Vide sup. p. 199.
(*r*) See 33 Hen. 8, c. 20.
(*s*) See Bac. Read. Uses.
(*t*) 2 Bl. Com. 330; 1 Sand. Uses, p. 70; 1 Cruise, Dig. 408; W. Jones, 127; Ld. Willoughby's case, per Doddridge, J., Gilb. Uses, 485, 3rd ed. by Sugd.
(*u*) 1 Sand. Uses, p. 17.
(*x*) 1 Cruise, Dig. 392.

use he held, who received the appellation of *cestui que use*. Of these divided interests, that of the feoffee alone obtained protection in the courts of common law; where he was considered as absolute owner. But a different doctrine was maintained in the courts of equity, which treated the *cestui que use*, on the other hand, as the true proprietor; and compelled the feoffee to uses to account to him for the rents and profits, and to hold the land at his disposal.

Uses, however, might be created, not only by an express agreement or declaration, but by mere implication from the nature of the conveyance itself. Thus if a man made a feoffment in fee to another, without any consideration, equity would presume that he meant it to the use of himself, and would therefore raise an implied use for his benefit (*y*); unless, indeed, he expressly declared it to be to the use of another, and then nothing was presumed contrary to his own expression (*z*). And here we may observe, that uses thus returning by way of implication to the grantor himself, were called *resulting* uses (*a*). Uses also were capable of being raised in some cases upon mere contracts, without the formality of any conveyance; and this either expressly or by implication (*b*). For if a man in consideration of natural affection, *covenanted*, that is, contracted under the solemnity of a deed, *that he would stand seised of his land to the use* of some near relative named; or of a wife, actual or intended; a court of equity, even though no valuable consideration passed, would enforce the use, and treat the covenantor thereafter as a mere trustee for the party whose benefit was designed (*c*). So if a man had *bargained and sold* his land to another, (that is, agreed to sell it to him,) for pecuniary consideration, but had made no actual feoffment or conveyance, equity would,

(*y*) 1 Sand. Uses, p. 68; Vin. Uses, F.; 1 Cruise, Dig. 442, 446, 450; Gilb. 118.

(*z*) 2 Bl. Com. 330.

(*a*) Cruise, Dig. ubi sup.; 2 Bl. Com. 335; Doe *v.* Rolfe, 8 Ad. & El. 650.

(*b*) 1 Sand. Uses, p. 118; vol. 2, p. 50; Chudleigh's case, 1 Rep. 139 b.

(*c*) 2 Bl. Com. 304; Gilb. Uses, 93; Sugd. Introd. to Gilb. xlvii.

under such circumstances, consider the estate as belonging to the party who had paid the money; and would consequently hold the bargainor to be seised of the land from thenceforth, to the use of the bargainee (*e*).

No contracts of either kind, however, would be enforced in equity, unless founded upon the particular species of consideration above described as appropriate to the case; a gratuitous engagement, in favour of a stranger, being insufficient to raise a use.

In general all persons were of capacity thus to become trustees and to hold to a use (*f*). There were, however, some exceptions. For persons attainted and aliens were for this, (as for all other purposes,) disqualified from holding land (*g*); and the doctrine was also established, that neither the king nor queen, on account of their dignity royal,—nor any corporation aggregate, on account of its limited capacity,—could be seised to any use but their own; that is, they might hold the lands but were not compellable to execute the trust (*h*).

As the person seised to uses was considered at the common law as absolute owner, his estate was of course subject to all the incidents which would attach to one held for his own benefit. It would devolve to his legal representative at his death, and might be aliened, or forfeited by his act while living; or become subject to execution for his debts, or to escheat for want of an heir. His wife also would be entitled to dower therein; and where the person so seised was a married woman, her husband, on her death, might claim the estate by the curtesy (*k*).

It is to be observed, too, that those who claimed under such derivative titles from the persons seised to uses, were

(*e*) 2 Sand. Uses, p. 50. But the precise technical words of *bargain and sale*, or *covenant to stand seised*, are not essential, if there be words tantamount. (Treat. on Equity, book *ii.* chap. 3, s. 1.)

(*f*) 1 Sand. Uses, p. 62.

(*g*) Ib. 65.

(*h*) 2 Bl. Com. 330; Sand. Uses, ubi sup.

(*k*) 1 Sand. Uses, pp. 75, 76; 1 Cruise, Dig. 403; Gilb. Uses, by Sugd. 3rd ed. p. 15; 2 Bl. Com. 330.

in some cases entitled to hold for their own benefit, free from any equitable obligation to perform the trust. Originally, indeed, it was held that the Court of Chancery could give relief only against the person himself in whom the trust was first reposed, and not against such as might derive title through him. [But this was altered in the reign of Henry the sixth with respect to the heir (*l*); and afterwards, by a parity of reason, with respect to such alienees as had purchased either without a valuable consideration, or with express notice of the use (*m*). But a purchaser for a valuable consideration without notice, or a creditor obtaining execution, might hold the land discharged of the use (*n*): and so if the person seised to uses died without an heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned,—were liable to perform the use; because they were not parties to the trust, but came in by act of law: though doubtless their title, in reason, was no better than that of the heir (*o*).]

The capacity of becoming a *cestui que use*, was even more extensive than that of becoming trustee; and it may be sufficient to observe generally, that all persons competent to take a conveyance of land might also take an interest in it by way of use (*p*).

The nature of this interest, constituting as it did a new sort of ownership, wholly distinct from the common law or legal estate, to which alone our attention was formerly directed, demands a particular consideration. It was in its nature so exclusively *equitable*, that the courts of common law accounted the *cestui que use*, if out of possession, as a mere stranger to the land; if in possession, as no more than a tenant at sufferance. They consequently

(*l*) Keilw. 42; see the Year-book, 22 Edw. 4, c. 6.
(*m*) Keilw. 46.
(*n*) Gilb. Uses, by Sugd. ubi sup.
(*o*) See 1 Sand. Uses, p. 229.
(*p*) Ibid.

allowed no effect to his alienation or demise of the land, if made without the consent of the trustee; and they held it not liable to forfeiture for his default, nor to execution for his debts (*q*). In equity, however, the properties or incidents of this kind of ownership were in a great measure assimilated to those of a legal estate; while on the other hand they were settled, in certain respects, upon principles more advantageous to the owner. These properties were principally as follows:—1. Contrary to the course of the common law with respect to freehold estates, uses even for life, or for a greater interest, might be created or assigned by secret deeds between the parties, or might be devised by last will or testament (*r*); for as the legal estate in the soil was not transferred by these transactions, no *livery of seisin* was necessary, or in its nature applicable to the case. 2. As a use was exempt from the restrictions of the common law as to the manner of creation or transfer, so it enjoyed a similar freedom as regards the modification of the interest itself. Thus, uses might not only be in possession, reversion, or remainder, (vested or contingent,) according to the fashion of legal estates; but might also be limited for future interests not corresponding with the legal idea of a remainder. When in the nature of estates in possession, reversion, or vested remainder, they were called uses *in esse;* in other cases they were described as uses *in futuro*, *contingent* uses, or uses in *possibility* (*s*). 3. [A use was not, as before remarked, subject to forfeiture (*t*); and did not escheat upon attainder, or other defect of blood; for escheats and the like are the consequences of *tenure*, and uses are held of nobody. 4. Again, no wife could claim dower, or husband an estate by curtesy, of a use (*u*); for no trust was declared for their

2 Bl. Com. 331; 1 Sand. Uses, pp. 73, 74.

(*r*) Bac. Read. Uses, 312, 308; 1 Sand. Uses, p. 72.

(*s*) Chudleigh's case, 1 Rep. 136 b, 211 b; Lovies' case, 10 Rep. 85 a; Bac. Read. Uses; Bac. Ab. Uses, (G).

(*t*) Vide sup. pp. 359, 360.

(*u*) Vernon's case, 4 Rep. 1 b; 2

[benefit, in the original grant of the estate. And therefore (as we have seen) it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the origin of modern jointures (*x*). 5. Lastly, a use could not be extended by writ of elegit, or other legal process, for the debts of the *cestui que use;* though the legal estate *was* liable to such execution for the debt of the legal tenant.]

The state of things here described was, however, attended with a variety of inconveniences. A person in possession of the land as apparent owner, would often, in reality, be a mere *cestui que use*, and consequently no more than a tenant at sufferance in regard to the legal estate; or he might, on the other hand, be a mere trustee, the equitable ownership and the right to receive the profits residing in another (*y*): and as putting an estate into use was often a secret transaction, with which strangers had no means of becoming acquainted, they were in constant danger of being deceived as to the true state of the title (*z*). [We cannot therefore be surprised at Lord Bacon's complaint that this course of proceeding "was "turned to deceive many of their just and reasonable rights. "A man that had cause to sue for land, knew not against "whom to bring his action, or who was the owner of it. "The wife was defrauded of her thirds, the husband of "his curtesy, the lord of his wardship, relief, heriot, and "escheat, the creditor of his extent for debt, and the "tenant of his lease" (*a*). To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of the *cestui que use* (*b*); allowed actions for the freehold to be brought

And. 75. As to *dower* and *curtesy*, vide sup. pp. 264, 267.

(*x*) Vide sup. p. 272.

(*y*) Bac. Ab. Uses and Trusts, p. 83.

(*z*) 1 Sand. Uses, pp. 17, 18, 23; Preamble of Stat. of Uses.

(*a*) Bac. Use of the Law, 153.

(*b*) See 50 Edw. 3, c. 6; 2 Rich. 2, st. 2, c. 3; 19 Hen. 7, c. 15.

[against him if in actual pernancy or enjoyment of the profits (*c*); made him liable to actions of waste (*d*); established his conveyances and leases made without the concurrence of his feoffees (*e*); and gave the lord the wardship of his heir, with certain other feudal perquisites (*f*).

These provisions all tended to consider the *cestui que use* as the real owner of the estate; and it being at length resolved to carry this idea into full effect, that celebrated Act was passed in the reign of Henry the eighth, (27 Hen. VIII. c. 10,) which is usually called the *Statute of Uses*, or, in conveyances and pleadings, the *Statute for transferring Uses into Possession*. The hint seems to have been derived from what was done at the accession of King Richard the third; who having, when Duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use (*g*). But to obviate so notorious an injustice, an act of parliament (1 Ric. III. c. 5) was immediately passed, which ordained that, where he had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees as if he had never been named; and that, where he solely stood enfeoffed, the estate itself should vest in the *cestui que use* in like manner as he had the use.] And so the statute of Henry the eighth, after reciting the various inconveniences before mentioned, and many others, enacts that, where any person or persons shall be seised of lands, tenements, or other hereditaments (*h*) to the use, confidence or trust of any other person or persons, or body politic, by any means whatsoever, (whether the use, confidence or trust

(*c*) 1 Rich. 2, c. 9; 4 Hen. 4, c. 7; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1.

(*d*) 11 Hen. 6, c. 5.

(*e*) 1 Rich. 3, c. 1.

(*f*) 4 Hen. 7, c. 17; 19 Hen. 7, c. 15.

(*g*) Vide sup. p. 362.

(*h*) The words in the Act are "honours, castles, manors, lands, "tenements, rents, services, reversions, remainders, or other hereditaments;" 27 Hen. 8, c. 10, s. 1.

fee simple, fee tail, for life or for years, or otherwise, and whether it be in possession, remainder or reverter,) the estate of the person or persons so seised to uses shall be deemed to be in him or them that *have* (i. e. are beneficially entitled to) the use, trust or confidence: and he or they shall thenceforth stand and be seised or possessed of the said lands or other hereditaments of and in the like estates as he or they had in the use, trust or confidence. The effect of this statute, wherever it comes into operation, is to *execute* the use; that is, it instantaneously, and as "by a kind of parliamentary magic," transmutes the equitable interest of the *cestui que use* into a legal estate of the same nature, and makes him tenant of the land accordingly, in lieu of the feoffee to uses, or trustee: whose estate, on the other hand, is at the same moment annihilated (*i*). The use is also said to be *transferred into possession* (*k*); that is, the legal estate conferred on the *cestui que use* is considered as an estate in actual seisin or possession (according to its nature), and such as requires no further ceremony for its completion (*l*). Thus if a feoffment be made to A. and his heirs to the use of B. and his heirs, an estate in fee simple in possession is *co instanti* vested by force of the statute, and without livery of seisin, in B.; and A. takes nothing (*m*): or if a person seised in fee bargains and sells to A. for a year, for a pecuniary consideration—which we may remember constitutes a seisin in the bargainor to the use of A. (*n*)—A. immediately becomes, by force of the statute and without entry, possessed of the land for the term of one year; the reversion remaining in the bargainor.

Here we must observe, however, that to bring the statute into operation, it is essential that there should

(*i*) 2 Bl. Com. 333.

(*k*) 1 Saund. 251, n. (2), 234 b, n. (4).

(*l*) As to the effect upon the statutory seisin, of the cestui que use *disclaiming* the use, see Burdett *v.* Spilsbury, 6 Man. & Gr. 456, *in notis*.

(*m*) A.'s momentary seisin vests no estate in him. (James *v.* Plant, in error, 4 Ad. & El. 766.)

(*n*) Vide sup. p. 361.

not only be a use, but a person *seised* to the use (*o*); for its provisions are confined to the case where "one person shall be seised to the use of any other person." And therefore where an existing term of years is limited to a use, as where a term of 1000 years is assigned to B. to the use of C., it was decided by the common law judges soon after the statute passed, and has been since uniformly held, that the provisions of the statute do not apply to the case, and that the use will consequently remain unexecuted. For of such estates as these, (being mere chattels,) the termor is not *seised*, but only *possessed* (*p*); and therefore there is no person "seised to a use" as the statute requires (*q*). Upon the same principle of close adherence to the words of the statute, it is held, that the seisin must be vested in a different person from the *cestui que use* himself: for otherwise the case does not arise of one person seised to the use of *another* (*r*). And the seisin should be for an estate as extensive as the use itself; for the statute only executes the use so far as there is a corresponding seisin. Thus if land be conveyed to A. for life to the use of B. in fee; the statute will vest the legal estate in B. only during the life of A. (*s*).

(*o*) 1 Sand. Uses, pp. 97, 113, 133; vol. 2, p. 58.

(*p*) Vide sup. p. 281.

(*q*) 1 Sand. Uses, p. 198; Gilb. Uses, 79; Bac. Read. Uses, 335; Dillon *v.* Fraine, Poph. 76. This case, of the limitation of a term of years to a use, must be carefully distinguished from the limitation of the *freehold* to a use for a term of years; for the latter *is* executed by the statute. (Gilb. Uses, 80.)

(*r*) 1 Sand. Uses, p. 96.

(*s*) Ib. p. 113; Gilb. Uses, 430. There was once a great controversy on the question out of what seisin "contingent uses" are in certain cases to be executed; and this involved the curious doctrine of *scintilla juris*. Thus, where land is conveyed by feoffment to A. and his heirs, to the use of B. for life, remainder to the use of his unborn sons successively in tail, remainder to the use of C. in fee; it is necessary, in order that the statute should transmute all these uses into legal estates, that there should be a seisin out of which to execute not only the uses *in esse* to B. and C., but the future uses to the sons of B. And by some it was thought necessary, also, that this seisin should exist with respect to each use at the time of its possessing the character of a use *in esse*. But

As regards the use itself, also, a similar rigour of construction was adopted by the early expounders of the statute; and their doctrines have long since passed into settled law (*t*). The decisions of the common law courts on this subject were as follows:—1. It was held that *no use can be limited upon a use* (*u*). Thus where A., being seised, bargains and sells for a pecuniary consideration to B., the legal estate passes (as we have seen) by force of the statute to B., to whom the use is limited by the effect of the bargain and sale; and from this it might seem reasonable to infer that where A. bargains and sells to B., *to the use of* C., the legal estate would vest in C., for the ultimate use is here limited to *him*. But the judges held that it would vest in this case also in B., and that C. would take nothing; for the statute, they said, would execute the first use limited to B., but not the second, limited to C.; the latter use being a mere nullity, inasall the actual seisin of the feoffee A. is exhausted before any son of B. is born, being drawn out of A. to execute the uses *in esse* to B. and C.; which uses, taken together, extend to the entire inheritance. Here, therefore, was the difficulty; and in order to meet it, it was held by great authorities that there still remained in the feoffee, though not an actual seisin, yet a *scintilla juris*, or possibility of *future* seisin, to serve the future uses as they came into *esse*. But, according to others, there was no necessity for resorting to this theory; it being sufficient, in their opinion, for the purpose of the statute, that at the time of the creation of the future uses there should be a seisin to serve them, though there should be none at the time of their coming into *esse;* and they concluded that in the case supposed there would remain in A. neither any seisin nor any possibility of seisin, after the uses to B. and C. were executed. (See Sugd. Pow. 8th ed. p. 19.) The controversy, however, is now disposed of by Act of Parliament; it being provided by 23 & 24 Vict. c. 38, s. 7, that such uses shall take effect when and as they arise by force of the original seisin to the uses; and that no *scintilla juris* shall be necessary or deemed to remain.

(*t*) This strictness has been attributed to a disinclination on the part of the judges to carry the abolition of uses so far as had been intended by the legislature. (First Real Prop. Rep. 8.)

(*u*) Gilb. Uses, 347; 1 Sand. Uses, p. 198; 2 Bl. Com. 335. See *per curiam*, Gilbertson *v.* Richards, 4 H. & N. 297.

much "as no use can be engendered of a use" (*x*). Upon the same principle a feoffment to A., to the use of B. in trust for C., was held to vest the legal estate in B.; and C. was allowed to take nothing (*y*). This maxim, that there can be no use upon a use, proceeded upon the principle that, after the limitation of one, another must be considered as *repugnant*, and therefore void. Yet the doctrine, however firmly settled, is, upon the whole, not satisfactory; for it was clearly intended, in the cases above supposed, that C. should have the beneficial interest; and the instant the first use was executed in B. he might without impropriety have been considered as seised to the use of C.; which second use the statute might as well have been permitted to execute as it did the first (*z*). 2. It was held that *where the person entrusted has any active duty to perform, he cannot be considered as holding to a use, or at least not such a use as the statute executes* (*a*). Thus, if lands be given to B. and his heirs, with a direction to *receive* and *pay over* the profits to C., this shall be no use in C.; though, on the other hand, if the direction were to *permit C. to take* the profits, this would be a use executed in him; for in the case last supposed, there is no *active* duty appointed for the trustee (*b*).

(*x*) Tyrrell's case, Dy. 155.

(*y*) 2 Bl. Com. 336; Gilb. Uses, Sugd. lx.

(*z*) Bl. Com. ubi sup.

(*a*) Bro. Feoff. al Uses, 52. See also 2 Saund. by Wms. 11 a, n. (17); Browne *v.* Ramsdon, 8 Taunt. 564; Doe *v.* Homfray, 6 A. & E. 206; Doe *v.* Scott, 4 Bing. 507.

(*b*) With reference to the distinction noticed in the text, we may observe, that though the trustee to whom some active duty is appointed takes the legal estate, he takes one only commensurate in duration with the period during which the duties are to be performed. Thus if land be given to B. and his heirs, with directions to pay over the profits to C. during the life of C., and then to permit D. to take the profits, the legal estate is vested in B. during C.'s life, but on D.'s remainder vesting in possession, *he* has the legal estate in virtue of the statute. (See Barker *v.* Greenwood, 4 Mee. & W. 429; Adams *v.* Adams, 6 Q. B. 860; Doe *d.* Muller *v.* Claridge, 6 C. B. 641.) As to the case where land is given to B. and his heirs, with directions to permit C., a *married woman*, to take the profits, see Doe *d.* Stevens *v.* Scott, 4 Bing. 505;

The uses (or intended uses) which were thus excluded from the operation of the statute, because there was no seisin to support them, or because they were limited on a precedent use, did not fail, nevertheless, to obtain protection from the courts of *equity;* for, in both cases, it was evident that the person directed to hold to the purpose which the statute was incompetent to execute, was never intended by the parties to have any beneficial interest, and that his capacity was merely fiduciary (*c*). Therefore the Court of Chancery determined that though the purposes pointed out were not uses executable by the statute, yet a *trust* subsisted in the person directed to perform the purpose; and that such trust was binding, if not at law, yet in conscience and in equity. To this the reason of mankind assented; and the interests in question, though rejected at law as *uses*, became established in equity, under the denomination of *trusts* (*d*). A similar protection was also given, for the same reason, and under the same name, to all those confidences which were excluded from the operation of the statute, on account of the active duties imposed on the trustee; and these were a very numerous and important class, comprising not only cases where the trustee was directed to receive and pay over the profits to other persons, but those where he was to sell the land for their benefit or to divide it among them, or the like. These, indeed, seem always to have been described as *trusts*, or special trusts, and never to have received the appellation of uses (*e*). They were obviously of a very different nature from those aimed at in the statute of uses; and were some of them so essential to the purposes of civilized society, and to the protection of those who were unable to act for themselves, that it is difficult to imagine a period in our legal history when they could be wholly

Doe *d.* Shelley *v.* Edlin, 4 Ad. & El. 582; Williams *v.* Waters, 14 Mee. & W. 166.

(*c*) See 2 Bl. Com. 336.

(*d*) Ibid.

(*e*) Bac. Read. Uses, 805; 1 Sand. Uses, pp. 2, 6, 10, 203.

unknown, or to suppose that they owed their origin to the introduction of uses.

Both these kinds of trust have ever since continued to be copiously created: the person whose benefit is designed by either species of trust is called the *cestui que trust*, and his interest is described as the *equitable* or *trust estate;* which distinguishes it from a *use* on the one hand, and from the *legal estate* on the other.

It will be evident, however, from preceding explanations, that, in the case of a passive trust, the trust estate cannot be effectively created without taking care to reduplicate the use, or to limit it upon a term of years instead of a freehold interest. Thus, if it is intended to give C. a trust (or equitable) estate, and not a legal one such as is recognized at the common law, it will not suffice to convey by feoffment to B. and his heirs "to the use of," or even "in trust for," C. and his heirs; for that use would be executed by the statute, and the legal estate would vest in C. But, on the other hand, the object may be accomplished by enfeoffing "A. and his heirs to the use of B. and his heirs, in trust for C. and his heirs:" for there being in this case a use upon a use, the first only will be executed by the statute, and the trust estate is undisturbed. So it may be accomplished by enfeoffing "A. and his heirs to the use of A. and his heirs, in trust for C. and his heirs;" for though the first use is not such a one as the statute executes (the seisin and the use being vested in the same person), yet there cannot be a use upon a use, whether the statute executes the first use or not; and therefore the interest of C. is not a use executed, but a trust (*f*). In like manner the object will be attained if an existing term for 1000 years be assigned "to A. to the use of C. and his heirs;" for A. not being seised, but possessed only, to the use of C., the statute will not execute the use, and A. remains trustee

(*f*) Tipping *v.* Cousins, Comb. 312; 1 Sand. Uses, p. 97; 2 ib. p. 72; and see Doe *d.* Lloyd *v.* Passingham, 6 Barn. & Cress. 305.

for C. As for the case of an active trust, no such artifice of conveyancing is necessary to constitute the trust estate; the duties required to be performed being sufficient in themselves to determine its character.

Among the kinds of trusts cognizable in equity, it may be right also briefly to advert to a large class with which we have at present no direct concern, viz., those which are constituted in respect of personal chattels: for the trusts of which we have hitherto spoken relate (it will be observed) exclusively to the realty and chattels real. As to personalty, it was never considered as capable of being held to a *use*, in the proper meaning of that term (*g*); and the statute of uses is confined in its terms to "lands, tenements, and hereditaments;" but, in the nature of things a *trust* of personal chattels must always have been of frequent occurrence; and from an early period it became the subject of protection in the courts (*h*).

The wide field of jurisdiction which the courts of equity gradually acquired, under the general denomination of "trusts," they from time to time sedulously improved; and by a long series of uniform determinations, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts have been made to answer in general all the beneficial ends of uses, without their inconveniences or frauds (*i*). Of this system, so far as it regards the nature of the estate of the trustee, and that of the *cestui que trust*, we will here endeavour to point out the fundamental principles; the subject being much too copious to be fully handled in a general treatise upon the English law.

First, with respect to the word "trust" itself: it has

(*g*) Gilb. Uses, by Sugd. 485; 1 Sand. Uses, p. 70; per Doddridge, W. Jones, 127.

(*h*) 1 Sand. Uses, 10; 2 Fonbl. Treat. Eq. 1, n. (*a*); 3 Bl. Com. 432; and see The Queen *v.* Abrahams, 4 Q. B. 159. In cases where the value of the trust estate or fund does not exceed a certain amount, the *county* court of the district has now a concurrent jurisdiction with the chancery division of the High Court of Justice (28 & 29 Vict. c. 99, s. 1).

(*i*) See 2 Bl. Com. 337.

varied somewhat, we may perceive, from its antient meaning. It formerly applied to every case where a use was created, as well as to other confidences; but where there is a use which the statute is competent to execute, there can no longer be said to exist a trust. The true definition of this term, at the present day, seems to be a confidence reposed by one man in another with respect to property committed to him as the nominal owner, but not involving a use which the statute is competent to execute. In practice, however, the term *trust*, as well as *trust estate*, is applied to express the beneficial interest of the *cestui que trust*, as well as the confidence reposed in his trustee.

Besides the distinction between *active* and *passive*, trusts are also frequently described as *executory*, or *executed*—the former term being applied to cases where the party, whose benefit is designed, is to take through the medium of a future instrument of conveyance which the trustee is directed to execute for the purpose; the latter to cases where no transaction of that kind is contemplated, but the trust estate is completely limited in the first instance (*k*). Again trusts (like uses) may be either expressly *declared*, or they may be *implied* from circumstances. Thus, if the legal estate in land be conveyed to A. upon such trusts as the grantor shall thereafter appoint; as such trusts are, prior to appointment, incapable of taking effect, and as it is clear that A. is not intended to hold the land for his own benefit; there arises, by necessary implication, until the appointment be made, a trust for the grantor (*l*). And trusts, when thus raised by implication for the benefit of the grantor himself, are called *resulting* trusts (*m*). So if an estate be purchased in the name of one person, and the consideration-money belong to or be paid by another, the land purchased will be subject to a trust for the person to

(*k*) 1 Fonbl. Treat. Eq. 441, n.; Bac. Abr. Uses, A.; Butl. Fearne, 90, 118, 139, &c., 9th ed.

(*l*) 1 Cruise, Dig. 477.

(*m*) As to a resulting trust in *stock*, see Sayre *v.* Hughes, Law Rep., 5 Eq. Ca. 376.

whom the money belonged (*n*). And an agreement for the sale of land, when once concluded, will make the vendor a trustee in equity for the purchaser (*o*).

Though neither the crown nor a corporation aggregate could be seised (as we have seen) to any use but their own (*p*), the case is otherwise with respect to a trust (*q*); and it may be laid down generally, that every description of person capable of holding land, is capable also of being a trustee. It is also a maxim in equity, that a trust shall never fail on account of the disability of the person appointed to perform it, or even from the omission to appoint any person as trustee. The court will consider the trust, when once substantially constituted, as fixing itself upon the person who, by reason of such disability or omission, may become entitled to the legal estate and will accordingly compel him to its observance (*r*).

The estate of the trustee at *law* (as distinguished from *equity*) is subject to all the incidents which attend an ordinary ownership of land. It devolves, therefore, when he dies, to his legal representative; and is liable, while he lives, to alienation by himself; but the claim of the representative, and in general also of the alienee, is subject, in contemplation of equity, to the original trust (*s*). With respect to the latter, however, the same rule is established as formerly with respect to uses, that a person who becomes alienee by purchase, for valuable consideration, and without notice that the trust existed, is not compellable in equity to its observance (*t*). As his claim is not inferior, in point of natural justice, to that of *cestui que trust*, equity will not interpose between them; the consequence of which is, that the legal title of the purchaser takes effect for his own benefit, while the latter is left to his remedy against the alienor personally, for his breach of trust. On the other

(*n*) 1 Sand. Uses, p. 212.
(*o*) Sugd. Vend. 154, 5th ed.
(*p*) Vide sup. p. 362.
(*q*) 1 Sand. Uses, p. 227.
(*r*) Ib. 226.
(*s*) Ib. 227; Gilb. Sugd. 13, n. (5).
(*t*) 1 Sand. Uses, p. 228; vide sup. p. 363.

hand, where the legal estate still remains in the trustee or his heir, but the purposes of the trust are satisfied, he is always compellable to divest himself of it in favour of the person beneficially entitled, by executing a proper conveyance. And it is provided by modern statutes (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55), the first of which is usually cited as the "Trustee Act, 1850," that if the trustee should refuse or neglect to convey when required (*u*), or if he should be an infant (*x*), or out of the jurisdiction, or cannot be found (*y*); or if it should be uncertain (where there are several trustees) which was the survivor (*z*); or whether the trustee last known to have been seised is living or dead, or, if dead, who is his heir or devisee (*a*); or if a person seised of land in trust dies intestate as to such land and without an heir (*b*),—in all these cases the court shall have power either to make an order vesting the estate in such person or persons, in such manner and for such estate as it shall direct (*c*); or may appoint some person to make the conveyance in lieu of the trustee or his heir (*d*).

It is further to be noticed that, at *law*, the estate of the trustee is liable to be taken in execution for his debts (*e*); and his wife is entitled to dower (*f*), and the husband of

(*u*) 15 & 16 Vict. c. 55, s. 2.

(*x*) 13 & 14 Vict. c. 60, ss. 7, 8.

(*y*) Sects. 9, 10.

(*z*) Sect. 13.

(*a*) Sects. 14, 15.

(*b*) Sect. 15.

(*c*) By 28 & 29 Vict. c. 99, the jurisdiction herein of the chancery division of the High Court of Justice is conferred also on the county court of the district in cases where the trust fund does not exceed a certain amount.

(*d*) 13 & 14 Vict. c. 60, s. 20. See also sect. 16, and 15 & 16 Vict. c. 55, s. 2, containing like provisions, where lands are subject to a contingent right in trust; and 13 & 14 Vict. c. 60, ss. 3, 4, in reference to the case of a *lunatic* trustee. See also 37 & 38 Vict. c. 78, s. 6, as to the case of a bare trust estate becoming vested in a married woman; and 44 & 45 Vict. c. 41, s. 30, as to the case of a sole trustee dying, whether testate or intestate, and the trust estate vesting in his legal personal representative as his heir.

(*e*) 1 Sand. Uses, pp. 230, 231; 1 P. Wms. 278.

(*f*) 2 Ves. sen. 634. As to *dower*, vide sup. p. 268.

a female trustee to curtesy (*g*). Upon these points it will be recollected that the position of the feoffee to uses, before the statute of Henry VIII., was the same; while, on the other hand, *cestui que use* remained without protection from the effect of these claims (*h*). But herein the modern trust differs remarkably from the use; for equity will now interfere in each of these cases, on behalf of the *cestui que trust*, and give him relief against the party who sets up any title of this description to the legal estate. Formerly, also, the incidents of forfeiture and escheat applied (generally speaking) to the estate of the trustee (*i*). But even prior to the modern enactment of 33 & 34 Vict. c. 23, by which escheat and forfeiture for treason or felony were taken away, it had been provided by 13 & 14 Vict. c. 60, ss. 46, 47, that no land, stock, or chose in action, held in trust or by way of mortgage, should escheat or be forfeited so as to affect the interest of the *cestui que trust* or mortgagor, by reason of the attainder or conviction of the trustee or mortgagee for any offence (*j*).

Such are the points that most deserve attention in regard to the estate of the trustee. If we turn now to the other party or *cestui que trust*, we may remark, in the first place, that every person is competent to stand in that capacity, unless labouring under such disability as would disqualify him from becoming the tenant of land. As to the nature of his interest, it was not the subject of protection, or even of notice (generally speaking), at law, but subsisted only in contemplation of equity (*k*); and it is considered as being of various kinds or degrees, according to the particular character of the trust created. It is in some instances a mere *charge* on the land; the *ownership* being vested in another person: as where a man by his will

(*g*) 7 Vin. Ab. 159. As to *curtesy*, vide sup. p. 264.

(*h*) Vide sup. p. 362.

(*i*) 1 Sand. Uses, p. 230.

(*j*) And see 15 & 16 Vict. c. 55, s. 8, authorizing the appointment of a new trustee in the place of a convict trustee.

(*k*) See Britten *v.* Britten, 4 Tyrw. 473; Roe *v.* Read, 8 T. R. 118.

devises land to one, and directs that it shall be charged with the payment of a legacy to another. In other instances it amounts, in contemplation of equity, to the actual *ownership:* and then the *cestui que trust's* estate or interest is modelled, in general, upon the rules of the common law with respect to legal estates. For in this and in other particulars, the principle professed is that *æquitas sequitur legem* (*l*). Thus there may be an equitable estate for life or years, or in fee or in tail; and in the latter case, the method of barring the entail will be the same as if the estate were legal. So an equitable interest may be either in possession or expectancy, as in the case of a legal estate. But where it is in the nature of a *contingent remainder*, it was never held subject to the common law rule, (now partly abolished,) of being defeasible by the determination of the particular estate before the contingency happened (*m*). The doctrine of "merger" also seems to apply to equitable as well as to legal estates,—providing the coalescing estates be both of the equitable description, and the merger would not be productive of any injustice or inconvenience (*n*). So the same rules of construction will in general apply to equitable as to legal estates; and particularly the important rule in Shelley's case (*o*). A trust of inheritance is also subject to the curtesy of the husband of *cestui que trust*, as if it were an estate at law (*p*); and in this respect it is placed on a more satisfactory footing than a use, which was exempt, as we have seen, from curtesy (*q*). It followed, indeed, till a comparatively recent period, the nature of a

(*l*) 2 Bl. Com. 330.

(*m*) 1 Prest. Est. 241; Hopkins *v.* Hopkins, Cas. temp. Talb. 44: 1 Atk. 590; and see Astley *v.* Micklethwait, 15 Ch. Div. 59; Abbiss *v.* Burney, 17 Ch. Div. 211.

(*n*) See 3 Prest. Conv. 558; Hopkins *v.* Hopkins, 1 Atk. 592; Phillips *v.* Phillips, 1 P. Wms. 41. As to *merger*, vide sup. p. 318, n. (*z*), at which place notice is taken of the provision in the Judicature Act, 1873, on that subject.

(*o*) Fearne, by Butl. 124, 9th ed.; Bale *v.* Coleman, 1 P. Wms. 142. As to the "Rule in Shelley's case," vide sup. p. 333.

(*p*) 1 Sand. Uses, p. 205. As to *curtesy*, vide sup. p. 264.

(*q*) Vide sup. p. 264.

use, in being exempt from dower: a circumstance resulting (it has been said) rather from the cautious adherence to some hasty precedents, than to any well-grounded principle (*r*); but by 3 & 4 Will. IV. c. 105, s. 2, the widow is made capable of claiming dower in equity out of any estate of inheritance in possession (other than in joint-tenancy), to which the husband was entitled beneficially, and in which she is not dowable at law; and this, whether the estate of the husband was wholly equitable, or partly legal and partly equitable (*s*). Again a trust estate, though formerly protected like a use from execution for debt, is now (with more regard to justice) made subject to such process. For, by the Statute of Frauds (29 Car. II. c. 3), s. 10, and the modern provisions for extending the remedies of creditors against the property of debtors contained in 1 & 2 Vict. c. 110, the lands and tenements of which any person is seised or possessed *in trust* for a judgment debtor, are made liable to be given over in execution to the judgment creditor (*t*).

But though, in general, a trust follows the nature of a common law estate, yet, on the other hand, it may be subjected, like a use, to limitations unknown to the common law. It is also exempt in its nature from the common law restrictions with respect to the manner of conveyance; for it has always been capable of being created or assigned, (even for an estate of freehold duration,)
livery, or by last will and testament. It might originally, indeed, have been established upon mere parol evidence. But now, by the Statute of Frauds, all trusts and confidences of lands, tenements or hereditaments, except such as arise by implication or construction of law, must manifested and proved by some writing signed by the party, or by his last will in writing (*u*). And the same

(*r*) 2 Bl. Com. 337.

(*s*) Vide sup. p. 270.

(*t*) The reader is referred to a later part of the work (viz. bk. v. c. xi.) for an explanation of the effect of a *judgment*, and of the law of execution.

(*u*) 29 Car. 2, c. 3, ss. 7, 8.

Act makes the like ceremony essential to the validity of any grant or assignment of this species of interest (*v*). A trust also was never subject to forfeiture by reason of the attainder or conviction of the trustee for any offence (*w*); nor does a trust of inheritance escheat for want of inheritable blood; for the defect of an heir confers no title, in this case, on the lord; it merely enables the trustee to hold the land discharged of the trust (*x*). Nor did such a trust of inheritance ever escheat to the lord on the attainder of the *cestui que trust* for felony (*y*). In these incidents the modern trust, it will be observed, follows the principle of the antient use.

It may be proper before we conclude, to take some notice of the subject of terms held *in trust to attend the inheritance*. Upon the purchase of real property a practice arose amongst conveyancers, of assigning upon a trust of such description, any mortgage term or trust term connected with the title, but of which the purposes had been satisfied. Thus, where land held in fee was mortgaged for a long term of years (as a thousand years), and, upon the estate being sold, the mortgagee was paid off out of the purchase-money, —it became usual for the purchaser (instead of taking a surrender of the term to himself, and so merging it in the inheritance) to keep it on foot and have it assigned to a trustee of his own nomination, in trust for himself (the purchaser), "and to attend and protect the inheritance."

(*v*) 29 Car. 2, c. 3, s. 9. As to the effect of these provisions, see 2 Saund. by Wms. 11 a, n. (*m*); Harris *v.* Pugh, 4 Bing. 335; Harris *v.* Booker, ibid. 96; Scott *v.* Scholey, 8 East, 467.

(*w*) 1 Sand. Uses, p. 206; Hob. 214; Attorney-General *v.* Sands, Hard. 490; 13 & 14 Vict. c. 60, ss. 46, 47. There was formerly an exception as to this in the case of treason. (See 33 Hen. 8, c. 20; 1 Sand. Uses, 207.)

(*x*) 2 Bl. Com. 337; and see Burgess *v.* Wheate, 1 W. Bl. 123; 1 Eden, 177; Barclay *v.* Russell, 3 Ves. 430.

(*y*) See 1 Sand. Uses, p. 288. Such a trust, however, is said by Hale (1 P. C. 249) to have been forfeited to the crown on the trustee's attainder for *treason*. (But see now 33 & 34 Vict. c. 23, s. 1.)

The reason of this practice was, that the beneficial or equitable interest in a term assigned upon such a trust, followed (though a mere chattel) all the limitations of the inheritance—belonged to the heir or devisee of the new owner, and not to his executor or administrator—and was subject to the other incidents of a fee simple (*z*); so that for all purposes of convenience, the case was the same as if it had merged into the inheritance; while, on the other hand, it afforded the purchaser a security which he could not have had if a merger had actually taken place. For if it afterwards turned out that prior to the purchase, but posterior to the creation of the term, there had been an intermediate alienation or incumbrance of the fee in favour of another person, to which the then trustee of the outstanding term had been no party, and of which the subsequent purchaser had had no notice when he took his conveyance and paid his purchase-money, he would be protected against it, through the medium of the term: for this, being the elder title, would also take the priority in point of legal effect; and, being assigned expressly in trust for him, became, for all beneficial purposes, his property. No such protection, however, resulted from such satisfied term where the precaution of thus assigning it over was neglected; for though, by construction of equity, the term would in that case also become attendant on the inheritance, the effect of this was only to make it attendant for the benefit of the different persons who from time to time became entitled to the inheritance; so that, in the example above given, the mortgage term, if left outstanding and not assigned, would be held in trust for the first and not for the second purchaser,—the title of the former being preferable in point of date (*a*). And, by the effect of a modern change in the law, the practice of assigning such satisfied terms has now ceased to prevail.

(*z*) Best *v.* Stamford, Prec. Ch. 252; 2 Freem. 288, S. C.; Wray *v.* Williams, 1 P. Wms. 137; 1 Sand. 229; Cooke *v.* Cooke, 2 Atk. 67.

(*a*) Second Report of Real Property Commissioners, p. 8.

For the protection afforded by the assignment thereof to a trustee being for several reasons precarious, and, even when effectual, being obtained at the expense of an innocent party, whose title was in point of natural justice at least as good as that of the party protected, it was provided by 8 & 9 Vict. c. 112 (*b*),—with respect to satisfied terms of years,—that such as should, either by express declaration or by construction of law, on the 31st December, 1845, be attendant upon the inheritance or reversion of any lands, should on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof they should be so attendant; with a proviso, however, that every such term of years made so attendant by *express declaration*, (although thereby made to cease and determine,) should afford to every person the same protection as it would have afforded him if it had continued to subsist, but had not been assigned or dealt with after 31st December, 1845; and should, for the purpose of such protection, be considered both at law and in equity to be a subsisting term. And with respect to terms of years (then subsisting or thereafter to be created) becoming satisfied after the 31st December, 1845, the same statute enacted that such as should, either by express declaration or by construction of law, after that day become attendant upon the inheritance or reversion of any lands should, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term should become so attendant.

We have now touched the principal points in the law of Uses and Trusts, considered as a species of estates; and for the present may dismiss them from our view. With respect to uses, indeed, there is another aspect under which they will very soon require to be again examined,

(*b*) As to this provision, see Doe *d.* Hall *v.* Moulsdale, 16 Mee. & W. 689; Plant *v.* Taylor, 7 H. & N. 211; Shaw *v.* Johnson, 1 Dr. & Sm. 412; Anderson *v.* Pignet, Law Rep., 8 Ch. App. 180.

viz., in their important (but incidental) connection with our system of *conveyances*. But this is a subject which belongs not to the present chapter. It will find a more proper place when we are engaged in the consideration of Title, or the manner in which estates may be acquired or lost (*c*).

(*c*) As to conveyances under the Statute of Uses, vide post, c. XVIII.

CHAPTER X.

OF TITLE IN GENERAL.

HAVING described the tenures by which lands or corporeal hereditaments may be held, and the kinds of estates that may be had in such as are of free tenure, we are next to consider, in pursuance of the division before laid down, the *title* to them, or manner of acquiring and losing estates therein (*a*). And the learning on this subject, though applicable to equitable as well as to legal estates, is of more importance with regard to the latter; because equitable estates are capable of being created or transferred by simpler methods than those in use at the common law, and indeed by any instrument sufficiently indicating the intention of the parties: the only formality to which they are in general subject being that introduced by the provision of the Statute of Frauds, referred to in the last chapter; which requires that all grants and assignments of any trust or confidence shall be in writing, and under the signature of the party (*b*). It is however to be observed, that conveyances of the same kind are commonly used, whether the estate dealt with be legal or equitable, and also that the rule of *descent* is the same in both (*c*).

[In proceeding to treat of the manner in which estates may be acquired and lost, it is obvious that we shall not have occasion to detach the consideration of loss from that of acquisition, but that they are reciprocal ideas; because, by whatever method one man gains an estate, by that same

(*a*) Vide sup. p. 172.
(*b*) Vide sup. p. 379.
(*c*) Goodright *v.* Wells, Doug. 771.

[method, or its correlative, some other man has lost it. For where the heir acquires by descent, or the devisee by will, the ancestor or testator has first lost or abandoned his estate by death; where the lord gains land by escheat, the estate of the tenant is first of all lost by the extinction of all his hereditary blood; where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession. So, in case of forfeiture, the tenant by his own mistaken view or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default. And in alienation by common assurances, the two considerations of loss and acquisition are so interwoven and so constantly contemplated together, that we never hear of a conveyance without at once receiving the idea as well of the grantor as of the grantee.]

The acquisition of an estate in land or other corporeal hereditament is commonly said to be either by *descent* or by *purchase;* but, more accurately speaking, it is either by *act of law* or by *act of the party;* which last is technically called *purchase* (*d*).

(*d*) This division is, in substance, suggested by Mr. Hargrave, Co. Litt. 18 b, n. (2). Blackstone, (vol. ii. pp. 201, 241,) considers all title as either by *descent* or *purchase*, and defines *purchase* (after Littleton, sect. 12) as "the possession of "lands and tenements which a man "hath by his own act or agree-"ment, and not by descent from "any of his ancestors or kindred." And according to Blackstone, (ubi sup. p. 244,) *purchase* comprises *escheat;* which, however, it may be observed, falls under the negative part only, and not the positive part of Littleton's definition. And accordingly Lord Coke remarks, "that an escheat or the like," is "not said to be a purchase," "because the inheritance is cast "upon, or a title vested in the "lord, by act in law, and not by "his own deed or agreement." (Co. Litt. 18 b.) The truth is, that it is impossible to reduce all titles to the alternative of *descent* or *purchase;* and as to *escheat* more particularly, it seems clear that it is neither the one nor the other. We may observe here, that in the Inheritance Act, (3 & 4 Will. 4, c. 106,) the meaning of the word *purchaser* is settled by a definition contained in the Act itself. But this is only so far as the particular provisions of that statute are concerned; vide post, p. 391.

Title by act of *law* expresses all those modes of acquisition, where the law itself casts the right to the estate upon the acquirer, independently of any act or interference of his own, or of any other person for that purpose. Of these the principal kind is title by *descent;* but the term will also properly include title by *escheat*, and also that of tenant by the *curtesy*, and of tenant in *dower* (*e*).

Purchase, on the other hand, though in its vulgar and confined acceptation it is applied only to such acquisitions of land, as are obtained by buying it for money or some other valuable consideration (*f*); yet it properly includes every lawful mode of coming to an estate by the act of the party, as opposed to the act of law (*g*): among which, our attention will chiefly be directed to the title by *occupancy*, by *forfeiture*, and by *voluntary transfer;* which last is usually described as that by *alienation* or *conveyance* (*h*).

This use of the term *purchase* (*perquisitio*), by which it is distinguished from title by mere act of law, and more particularly from descent, corresponds, it may be remarked, with that of *conquest* (*conquæstus* or *conquisitio*) in use among the feudists (*i*), and in the law of Scotland (*k*). [And in like manner, the first purchaser (or he who first brought the estate into the family which at present owns it) was styled, among the Norman jurists, the conqueror or *con-*

(*e*) Co. Litt. 18 b. As to *escheat*, sup. p. 199; as to *curtesy*, p. 264; as to *dower*, p. 269.

(*f*) 2 Bl. Com. 241.

(*g*) According to Lord Coke, the term purchase imports only a *lawful* acquisition, for he says, that "such "as attain to lands by mere injury "or wrong, as by disseisin, intru- "sion, abatement, usurpation, &c. "cannot be said to come in by "purchase, no more than robbery, "burglary, piracy, or the like, can "justly be termed purchase." (Co. Litt. 18 b.)

(*h*) There are other methods of transferring land belonging to the head of *purchase;* which it is deemed expedient to reserve for discussion in subsequent divisions of the work; those, for example, which the statute law has provided by the seizure of lands under an execution by elegit (vide post, bk. v. c. x.), and by which the estate of a bankrupt is vested in his trustee. (Vide post, bk. II. pt. II. c. VI.) As to the purchase of *personal* property vide post, bk. II. pt. II. c. v., where the *contract of sale* is discussed at large.

(*i*) Craig, l. 1, t. 10, s. 13.

(*k*) Dalrymple on Feuds, 10.

[*quereur* (*l*); which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was in his own and his successors' charters, and by the historians of the times, entitled *conquæstus*, and himself *conquæstor* or *conquisitor;* signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived.]

Among the different titles that have been enumerated, we have already been led incidentally to discuss those of tenant by the curtesy and tenant in dower (*m*). At present, therefore, we may confine our attention to *descent*, *escheat*, *occupancy*, *forfeiture* and *alienation:* the two first being (as has been pointed out) titles by act of law; the three last, titles by purchase.

(*l*) Gr. Coustum. Gloss. c. 25.

(*m*) As to tenancy by the curtesy, vide sup. p. 264; as to dower, vide sup. p. 269.

CHAPTER XI.

OF TITLE BY DESCENT.

We have seen in a former place that an estate of inheritance in fee simple or fee tail, is, on the death of the owner without having disposed of it during his lifetime by a conveyance *inter vivos* or by his will, cast by the law on his heir by a title called *descent* (*a*). We are now to consider more particularly the nature of such descent, and the rules by which it is governed (*b*). The discussion will turn principally, indeed, upon the nature of the descent in fee simple, for that in fee tail is only in the nature of an exception or variation upon the ordinary law of succession; and when that law is fully understood, the general explanations before given with respect to estates tail, will throw sufficient light on descent in an estate of that nature.

[The doctrine of descent, or law of inheritance in fee simple, is a point of the highest importance, and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descent is broken and altered, perpetually refer to this settled law of inheritance as a *dătum* or first principle universally known, and upon which their subsequent limitations are to work. In order to treat a matter of this universal consequence more clearly, it will

(*a*) Vide sup. p. 237.

(*b*) As to descent, see Co. Litt. 237 a—250 a; and the Act for improvement of the law of inheritance. (3 & 4 Will. 4, c. 106.) In this Act, the term "descent" means "the "title to inherit land by reason of "consanguinity; as well where the "heir shall be an ancestor or collateral relation, as where he shall "be a child or other issue."

[be expedient to lay aside such matters as will only tend to breed embarrassment and confusion in an inquirer. We shall therefore decline considering at present, who are and who are not capable of being heirs, reserving that for the chapter on escheats (*c*).] We shall also pass over descents by particular custom, as to all the sons in gavelkind and to the youngest in borough-English; for these cannot conveniently form a subject for special consideration in such a treatise as the present (*d*). And our present inquiry will therefore almost exclusively relate to the subject of descent in fee simple as generally established.

[It may be right, however, before we proceed further, to make this preliminary remark with respect to the nature of the heir's title,—that no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis.* Before that time, the person who is next in the line of succession is called an heir *apparent* or heir *presumptive.* An heir apparent is one whose right of inheritance is indefeasible, provided he outlives the ancestor: as the eldest son, who must by the course of the common law be heir to the father whenever he happens to die. An heir presumptive is one who, if the ancestor should die immediately, would be his heir; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother or nephew, or daughter: in the former cases the estate shall be divested and taken away by the birth of a posthumous child; and in the latter, it shall also be totally divested by the birth of a posthumous son (*e*).]

It may also be material to observe, that the estate

(*c*) Vide post, c. XII.
(*d*) Vide sup. pp. 63, 210—212.
(*e*) 2 Bl. Com. 208.

claimed by the heir must necessarily be one that remained in the ancestor, or deceased owner, at the time of his death, and of which he made no testamentary disposition; the title of an alienee in his lifetime, or of a devisee under his will, being preferable to that of the heir.

These things being premised, let us now examine the doctrine of descent itself; or the rules according to which the heir to an estate in fee simple is to be ascertained, when the succession to it opens or becomes vacant upon the death of the proprietor.

This branch of law is founded for the most part not on statute, but on the custom of the realm; being in point of antiquity referable to a period at least as early as the reign of Henry the second (*f*). At that time, indeed, its development appears to have been in some degree imperfect; but it had attained to complete maturity in the reign of Henry the third, or at latest in that of Edward the first (*g*); after which, it underwent no change for the space of more than five hundred years, until at length partially reconstructed in the year 1833 by the Act of 3 & 4 Will. IV. c. 106, passed "for amendment of the law of inheritance" (*h*).

In proceeding to delineate the present state of this branch of the law, it will be expedient in the first instance to mention that there are a few rare cases of descent which will require a particular and separate consideration, which consideration they will accordingly receive before the chapter closes; but passing these by for the present, and confining ourselves to the ordinary and general view of descent, we may lay down with respect to it the follow-

(*f*) This appears from the treatise of Glanville (written about the year 1181), whose account of the law of inheritance comprises all the principal features of the system now existing.

(*g*) Hale's Hist. C. L. c. 11; Hist. Eng. Law, by Reeves, vol. i. p. 311; vol. ii. pp. 246, 317.

(*h*) This statute was founded on the first report of the commissioners appointed in 1828, to revise the laws of real property.

ing rules or canons applicable to all descents taking place on a death on or after 1st January, 1834 (*i*) :—

I. In every case the descent shall be traced from the purchaser.

This primary law of descent is laid down in the form here propounded by 3 & 4 Will. IV. c. 106, s. 2, and the Act gives its own definition of the sense in which the expression of *the purchaser* is here to be understood—a definition not entirely harmonizing with that of the word *purchase*, as given in the last chapter; for (in substance) the statute defines *the purchaser* to mean the person who last acquired the land otherwise than by descent (*k*).

(*i*) The Inheritance Act does not affect the mode of tracing descent in a manner subject to a particular custom of descent (Muggleton *v.* Barnett, 2 H. & N. 653). The statute also applies to no descent which took place on a death *prior to the* 1*st of Jan.* 1834. For such descents, we must refer to the system of Blackstone, according to which the annexed Table of Descent (No. I.) is arranged, and of which the Rules (or Canons) are as follows—

Rule 1. That inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum*, but shall never lineally ascend.

Rule 2. That the male issue shall be admitted before the female.

Rule 3. That when there are two or more males in equal degree, the eldest only shall inherit, but the females altogether.

Rule 4. That the lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

Rule 5. That, on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.

Rule 6. That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

Rule 7. That in collateral inheritance the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have in fact descended from a female.

(*k*) 3 & 4 Will. 4, c. 106, s. 1. The words of the Act are, that the purchaser "shall mean the person "who last acquired the land other-"wise than by descent; or than by "any *escheat*, *partition*, or *enclo-*"*sure*, by the effect of which the "land shall have become part of or "descendible in the same manner as "other land acquired by descent."

The effect then of the Rule above laid down is as follows: that if the deceased owner of an estate in fee simple came to it by purchase, that is, in any other manner than by descent, the party claiming it as heir must make *him* the *propositus*, or person from whom consanguinity is to be traced; while, on the other hand, if he came to it by descent from some purchasing ancestor, *that ancestor* must be made the *propositus*. Thus if John Stiles, in the annexed Table of Descent (No. II.), die the owner of an estate, which he acquired by purchase, any person claiming it as heir must prove that he is heir to John Stiles; that is, stands in such relation of consanguinity to John Stiles as the laws of descent hereafter laid down make sufficient in the particular case: but if John die owner of an estate which descended to him from Geoffrey his father, by whom it was originally purchased, the claimant must prove that he is heir to Geoffrey the father; who becomes in that case the *propositus* instead of John, the last owner: one consequence of which is, that no relation to John *ex parte maternâ* can, as such, ever inherit. Again, if the estate descended to John from Lucy Baker, his mother, who was the purchaser, the descent must in that case be traced from *her*; and John's relations *ex parte paternâ* are, on the same principle, necessarily excluded. It often happens, however, especially in long descents, that it is uncertain by whom an estate was originally purchased; and against this difficulty of proof the act of parliament provides by the following rule of *evidence*, which is to be understood as a necessary supplement to the rule of descent under consideration; viz. that the last owner, or (as the Act describes him) the person "last entitled to the land" (*m*),

(*m*) In this statute the expression "*last entitled*," is made to extend "to the last person who "had a right thereto, whether he "did or did not obtain the possession, or the receipt of the rents "and profits thereof" (3 & 4 Will. 4, c. 106, s. 1); and the word "land" to all hereditaments, whether corporeal or incorporeal, of whatever tenure, and whether the estate is in possession, rever-

shall be considered to have been the purchaser, unless it shall be proved that he inherited it; and that the same rule shall be constantly applied at every step upward of the pedigree (*n*). Therefore if John Stiles is the person last entitled to an estate, and dies, and it does not appear whether he purchased it or not, the claimant must prove descent from *him*. So if he inherited it from his father Geoffrey, but it is unknown whether Geoffrey purchased it or not, the claimant must make himself heir to *Geoffrey;* and, on the same principle, if it can be shown that Geoffrey took by descent from George, then *George* must be made the *propositus*.

This 1st canon, though newly introduced by the Inheritance Act of 1833, is mainly founded on the antient maxim, that *none shall claim as heir who is not of the blood of the purchaser* (*o*); [a maxim peculiar to our own laws, and those of a similar original; for it was entirely unknown among the Jews, Greeks, and Romans, none of whose laws looked any further than the last owner of the estate, but assigned him an heir without considering by what title the estate was gained, or from what ancestor derived. But the antient law of Normandy agreed with ours in this respect; nor indeed is that agreement to be wondered at, since the law of descent in both is of feudal origin, and this rule cannot otherwise be accounted for than by recurring to feudal principles (*p*).

When feuds first began to be hereditary, that is, subject to succession according to consanguinity, it was made a necessary qualification of the heir who would succeed to a feud, that he should be lineally descended from the first feudatory or purchaser (*q*). In consequence whereof, if a

sion or remainder, &c. (3 & 4 Will. 4, c. 106, s. 1.)

(*n*) Sect. 2.

(*o*) "And note, it is an old and "true maxim in law, that none "shall inherit any lands as heir, "but only the blood of the first "purchaser."—Co. Litt. 12 a; and see 2 Bl. Com. 220.

(*p*) Grand Coustum. c. 25.

(*q*) 1 Feud. 20.

[vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring, —not even to his brother,—because he was not descended nor derived his blood from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then, on failure of his own descendants, his brother, or such other collateral relation as was descended (or derived his blood) from the first feudatory, might succeed to such inheritance.

To this purpose speaks the following rule: "*frater fratri sine legitimo hærede defuncto, in beneficio quod eorum patris fuit, succedat; sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit*" (*r*). The true feudal reason for which rule was this, that what was given to a man for his personal service and personal merit, ought not to descend to any but the heirs of his person; and therefore as now in estates tail, (which a proper feud very much resembled,) so in the feudal donation, "*nomen hæredis in primâ investiturâ, expressum tantum ad descendentes ex corpore primi vasalli extenditur, et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant*" (*s*). The will of the donor or original lord, when feuds were turned from life estates into inheritances, not being to make them absolutely hereditary, like the *allodium*, but hereditary only *sub modo* (*t*); not hereditary to the collateral relations or lineal ancestors, or husband or wife of the feudatory, but to the issue descended from his body only.]

Under this system therefore it was necessary that a person claiming by descent on the death of the last proprietor, should prove himself not only to be of the blood of, but lineally descended from, the purchaser; for neither in a *feudum novum* nor in a *feudum antiquum* were the collateral relations of the purchaser entitled to succeed. However, in process of time, when the feudal rigour was in part

(*r*) 1 Feud. sect. 2.
(*s*) Craig, l. 1, tit. 9, sect. 36.
(*t*) As to *allodium*, vide sup. pp. 174, 185.

abated, a method was invented to let in to the inheritance the collateral relations, on failure of the descendants of the grantee, by granting him a *feudum novum* to hold *ut feudum antiquum;* that is, with all the qualities annexed to a feud derived from his ancestors (*u*); and then (though the lineal ancestors themselves were always excluded, for reasons which will hereafter appear,) yet the collateral relations of the purchaser,—that is, the descendants of those ancestors,—were admitted to succeed, even *in infinitum*, because they might have derived their blood from the first *imaginary* purchaser. [For since it was not ascertained in such general grants whether this feud should be held *ut feudum paternum* or *feudum avitum*, but merely that it should be held *ut feudum antiquum*, as a feud of indefinite antiquity,—that is, since it was not ascertained from which of the ancestors of the real purchaser this feud should be supposed to have descended,—the law would not ascertain it either, but would suppose any of his ancestors *pro re natâ* to have been the first purchaser. And therefore it admitted any of his collateral kindred (who had the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors (*v*).]

Of this nature, it is said, were all the feudal grants of fee simple estates in this kingdom (*x*). They were no other than grants of a *feudum novum*, to be held *ut antiquum*, or feud of indefinite antiquity; while, on the other hand, a gift in tail (where none but the lineal descendants of the first donee are admitted) proceeded on the principle of a *feudum strictè novum*.

But while the old feudal requisite of a lineal descent from the real purchaser was thus substantially set aside, it continued nevertheless to be necessary that the claimant should be of his *blood;* for no person, without being

(*u*) 2 Bl. Com. 221.

(*v*) See the case of Kynnaird *v.* Leslie, Law Rep., 1 C. P. 389.

(*x*) See Wright's Tenures, 180; 2 Bl. Com. 222.

related to him either lineally or collaterally, could be supposed to be lineally descended from the imaginary purchaser. And as it was necessary that the claimant should be of his blood, so it was from him, as a root, that the descent was in some cases to be traced. For if the estate which descended was of a kind in which the owner could not acquire actual seisin of the land, (as in a reversion or remainder expectant upon a freehold, in which case the actual seisin belonged to the particular tenant,) the rule was that the claimant must trace his descent from (or, as it was usually expressed, *make himself heir to*,) the purchaser (*y*). Supposing the estate descended, however, to have been of a kind in which the owner *could* acquire actual seisin, as in the case of an estate in possession, or a reversion or remainder expectant on a term of years (*z*), the rule was different; for here another antient maxim intervened, and required *that the claimant should make himself heir to the person last actually seised of the inheritance* (*a*); every person who obtained an actual seisin, whether he were an original purchaser, or derived his title by descent, being considered as a new root, from which all future claimants were to spring; a principle that was briefly expressed by the adage *seisina facit stipitem* (*b*). Thus if Geoffrey Stiles, the father, died seised

(*y*) Ratcliffe's case, 3 Rep. 42 a; Co. Litt. 15 b, 191 b; Burton's Compend. 112; Doe *v.* Hutton, 3 Bos. & Pul. 649, 656; Roe *d.* Thorne *v.* Lord, 2 Bl. Rep. 1099.

(*z*) As to an estate in possession, and one in reversion, vide sup. pp. 312—320.

(*a*) "A man that claimeth as heir "in fee simple to any man by de- "scent must make himself heir to "him that was last seised of the "actual freehold and inherit- "ance."—Co. Litt. 11 b; and see Ratcliffe's case, 3 Rep. 41 b, 42 a.

(*b*) Hale's Hist. C. L. c. 11. Blackstone's explanation of this principle is, that the law required notoriety of possession as evidence that the ancestor had that property in himself which was to be transmitted to his heir; "which noto- "riety," says he, "had succeeded "in the place of the antient feudal "investiture, whereby, while feuds "were precarious, the vassal on "the descent of lands was formerly "admitted in the lord's court, and "there received his seisin in the "nature of a renewal of his ances- "tor's grant, in the presence of the "feudal peers; till at length, when

of land of which he was the purchaser, and which descended to John as his heir, and John died before entry, the next claimant was to make himself heir to Geoffrey; but if John entered and obtained actual seisin, it would then be necessary to claim as heir not to Geoffrey, but to John. And the difference was material; because the heir to the person last seised and the heir to the purchaser were not necessarily the same person. If John, for example, died leaving a half brother, his father's son, the latter might possibly, on John's decease, be next heir to Geoffrey the father; but it was impossible, as the law then stood, that he should be heir to John, descent not then being allowed between those related by the half blood (*c*). The rule of which we speak did not make it the less necessary, indeed, that the claimant should be of the *blood* of the purchaser; for this, in every case of descent, was universally required: but if he had that qualification, and could make himself heir to the person last seised, he was entitled to succeed, whether he could make himself heir to the purchaser or not; while, on the other hand, his being heir to the purchaser was not sufficient, unless he was also heir to the person last seised (*d*). Thus if John Stiles had purchased land and died, leaving no other kindred than his father's brother and his own brother of the half blood (his father's son), the uncle would have been his heir, as the brother (by the rule already noticed) could not have claimed in that character; and if the uncle had also obtained seisin and died, without other kindred than John's half brother, the latter would then have been entitled to succeed, for he would have been heir to the person last

"the right of succession became "indefeasible, an entry on any "part of the lands within the "county (which, if disputed, was "to be afterwards tried by those "peers), or other notorious possession, was admitted as equivalent to the formal grant of seisin, "and made the tenant capable of "transmitting his estate by descent."—2 Bl. Com. 209.

(*c*) Co. Litt. 15 b.

(*d*) Hale's Hist. C. L. c. 11.

seised, and of the blood of the purchaser, though not the heir of the purchaser (*e*). On the other hand, if John Stiles had inherited land purchased by Geoffrey, and died seised without other kindred than his half brother (his father's son), the latter could not have inherited, because unable to make himself heir to John; and yet he would have been heir to Geoffrey.

It is to be observed, however, that in many cases to trace descent from the person last seised, amounted in effect to the same thing as tracing descent from the purchaser. For where the last owner (or person on whose death the succession became vacant) happened to have been in fact the purchaser of the estate, he would also be the person last actually seised. Thus if it were an estate in possession acquired by feoffment, this implied (as elsewhere shown) a real delivery to him of the actual seisin (*f*); and supposing it to have been acquired by devise (under the statute of wills), or by a conveyance under the statute of uses (of the nature of which we shall speak hereafter), the case would be in effect the same; for the actual seisin (so far at least as would suffice to make him the root of descent) would here be transferred to him without entry, by construction of law (*g*). So if his estate were a reversion or remainder in fee expectant on a term for years, he would be clothed with an actual seisin of the fee (upon a principle before

(*e*) H. Chit. Desc. 115.

(*f*) Vide sup. p. 233.

(*g*) Per Holt, 1 Show. 74; R. *v.* Sutton, 3 A. & E. 611; and see Watk. Desc. c. 1, s. 6. The expression used by the learned author of that treatise is, that "such a property" is thereby "vested or fixed" in the purchaser, as to make the land descendible to his heirs. But as regards estates in possession, it seems more correct not to depart from the expression *actual seisin*, as nothing short of this will suffice to satisfy the terms of the rule, *seisina facit stipitem*. It is true, that Lord Coke appears to consider the seisin acquired under a devise or the statute of uses as a seisin in *law*; but he probably means by this, an actual seisin by construction of law. It is clearly more than a seisin in law such as that of the heir, which requires to be completed by entry, and is no actual seisin. (See Co. Litt. 111 a, 266 b.)

explained), through the medium of the possession of the particular tenant (*h*). In all such cases, therefore, if the claimant made himself heir to the purchaser, he would also make himself heir to the person last actually seised; and as he would thereby moreover prove his consanguinity to the purchaser, he would satisfy both the conditions required to make out a descent in fee simple.

These explanations will suffice not only to explain the nature of the new rule now laid down by the Inheritance Act, but to prove also its convenience and propriety. It discards in effect the maxim of *seisina facit stipitem;* and establishes in a general sense the rule, which formerly obtained only in certain instances, that descent shall be traced from the purchaser. In point of simplicity and uniformity of system, the advantage is consequently obvious; while, on the other hand, nothing is sacrificed which it could be useful to retain. In very numerous instances the descent (as we have seen) was in effect already traced from the purchaser; and though it was otherwise in cases where the last owner had become entitled by descent to an estate of a kind in which actual possession could be acquired, no sufficient reason could at the present day be shown (whatever may formerly have existed) in favour of such a distinction. Indeed the maxim of *seisina facit stipitem* was attended with material inconvenience; for it was sometimes difficult to determine what would amount to a seisin sufficient to constitute a *stipes;* and highly unsatisfactory besides, that the right to the succession should in any case depend on so unimportant a circumstance, as the omission of the owner to make entry, before his death, on the land he had acquired by inheritance (*i*).

(*h*) Vide sup. p. 322.

(*i*) See First Real Prop. Rep. p. 15. The operation of the 1st Canon requiring descent to be traced in every case from the purchaser, has been the subject of discussion in the particular instance of a man who, after purchasing lands in fee simple, dies intestate leaving two daughters, whereof one dies intestate leaving a son. And it has been established, that to such son the whole of his mother's moiety passes, as being, in respect of that

Before we dismiss the Rule under consideration, it must be remarked that though the "purchaser" is defined in the Act as the person who last acquired the land otherwise than by descent, yet to apply the definition properly in cases of a certain description, it is necessary to take some other parts of the statute into account. Thus it might be doubted, in the absence of a positive rule, whether under given circumstances a man acquires by *descent* or not, so as to bring the case within the definition; as where a man devises land in fee "to my heir," or to John Stiles—he being the person who, on the testator's death, becomes his heir. In this case, if the devise was made in such form that the devisee would take an estate in fee, of precisely the same quality that he would otherwise have taken by descent, it was the rule of the common law that the descent would take effect and not the devise; for the law gave the preference to the descent as the elder title (*k*). The contrary rule, however, which is manifestly more consonant with reason and convenience, is now established by the legislature, it being provided by the Inheritance Act (sect. 3), "that when any land shall have been "devised by any testator who shall die after 31st De- "cember, 1833, to the heir, or to the person who shall be "the heir of such testator, such heir shall be considered "to have acquired the same as a devisee, and not by "descent" (*l*). Again, it might be doubted, in the absence of a positive rule, what amounts to the *last acquisition* of an estate, so as to bring the case within the meaning of

share, the heir of the purchaser. See Cooper *v.* France, 14 Jur. 214; and Lord St. Leonards on Real Property Statutes, p. 282.

(*k*) 2 Bl. Com. 242; 2 Saund. by Wms. 7, n. (4); 1 Roll. Abr. 626; Doe *d.* Timins, 1 Barn. & Ald. 530. This is the reason assigned in the books. It seems probable, however, that the rule had a feudal object, and that it was intended for the protection of the lord, who would lose the fruits of his seigniory if the heir did not take by descent.

(*l*) As to the effect of this provision, with regard to a person who being both heir and devisee elects to enter as *heir*, see Bickley *v.* Bickley, Law Rep., 4 Eq. 216.

the definition; as where land is limited by any assurance to the person, or to the heirs of the person, who shall have thereby conveyed the land; for the rule of the common law was that such person acquired nothing by such assurance, but was entitled as of his former estate (*l*). It is, however, now provided by the Inheritance Act (sect. 3), "that when any land shall have been limited by any "assurance executed after the 31st of December, 1833, to "the person or to the heirs of the person who shall thereby "have conveyed the same land, such person shall be con-"sidered to have acquired the same as a purchaser by "virtue of such assurance, and shall not be considered to "be entitled thereto as of his former estate or part "thereof."

II. A second general Rule or canon is, that inheritances shall in the first place lineally descend to the issue of the purchaser, *in infinitum*.

The principle of placing the lineal descendants first in succession to their ancestor is, under all systems of descent, invariably adopted, and may be said to be of universal obligation or propriety; for even if it be held that the laws by which property is transmitted from one man to another, are in every case of an arbitrary nature, and *juris positivi* only (a doctrine which there is great difficulty in admitting as regards the succession of relatives), yet at least, in the choice of rules, it may happen that there are some much more consonant than others to the common feelings of mankind and the natural sense of what is proper; and such principles as these seem universally to suggest, that whenever a right of property transmissible to representatives is admitted, the possessions of the parents should go, upon their decease, in the first place to their offspring, as those to whom they have given being, and for whom they are therefore bound to provide (*m*).

(*l*) See Co. Litt. 22 (b).

(*m*) 2 Bl. Com. 210.

III. We may lay it down as a third Rule, that the children of the purchaser are preferred to their own issue; that, among such children, males are preferred to females; and that an elder male is preferred to a younger, but females (where there are several) take together.

1. The children of the purchaser are preferred to their own descendants, because (among other obvious reasons), they are nearer to him in blood; accordingly, if any child of the purchaser, living at his decease, has issue also living at the same period, the estate will descend to the child (who is more nearly related to the purchaser), and not to the grandchild or other descendants, who are more remote.

2. Among the children of the purchaser, males take before females, or, as our male lawgivers have expressed it, the worthiest of blood shall be preferred (*n*). Thus if John Stiles hath two daughters, Margaret and Charlotte, and afterwards two sons, Matthew and Gilbert, and dies: first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters.

[This preference of males to females is entirely agreeable to the law of succession among the Jews (*o*), and also among the states of Greece, or at least among the Athenians (*p*); but was almost totally unknown to the laws of Rome (such of them, at least, as are now extant), wherein brethren and sisters were allowed in general to succeed to equal portions of the inheritance (*q*). Without entering into the comparative merits of the Roman and the other constitutions in this particular, or examining into the greater dignity of blood in the male or female sex, it is sufficient to observe that our present preference of males to females seems to have had its source in the feudal law; for though our British ancestors (the Welsh) appear to have given a preference to males (*r*), yet our Danish pre-

(*n*) Hale's Hist. Com. Law, c. 11.
(*o*) Numbers, chap. xxvii.
(*p*) Petit. LL. Attic. lib. 6, tit. 6.
(*q*) Inst. iii. 1. 6.
(*r*) Stat. Wall. 12 Edw. 1.

[decessors who succeeded them seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance (*s*). But the feudal law of the Saxons on the continent, (which was probably brought over hither and first altered by a law of King Canute,) gives an evident preference of the male to the female sex. "*Pater aut mater defuncti, filio non filiæ hæreditatem relin-*" *quent. Qui defunctus non filios sed filias reliquerit, ad eas* "*omnis hæreditas pertineat*" (*t*). It is possible, therefore, that this preference might be a branch of that imperfect system of feuds which obtained here before the Conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of King Henry the first, it is not (like many Norman innovations) given up, but rather enforced (*u*). The true reason of preferring the males must be deduced from feudal principles; for by the genuine and original policy of that constitution females could never succeed to a proper feud, inasmuch as they were incapable of performing those military services for the sake of which that system was established (*x*). But our law does not extend to the total exclusion of the females, as the Salic law and others, where feuds were most strictly retained. It only postpones them to males; for though daughters are excluded by sons, yet they succeed where there is no son: our law, like that of the Saxon feudists before mentioned, thus steering a middle course between the actual rejection of females, and the putting them on a footing with males.]

3. Primogeniture is established among the male children of the purchaser, but not among the female. [As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters;

(*s*) Wilkins, Leges Anglo-Sax. LL. Canut. c. 68.
(*t*) Tit. 7, s. 1 and 4.
(*u*) Leg. Hen. 1, c. 70.
(*x*) 1 Feud. 8.

[but if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners (*y*).

This right of primogeniture in males seems antiently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance (*z*); in the same manner as with us, by the laws of King Henry the first, the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence (*a*); and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary (*b*). The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way, and has the appearance (at least in the opinion of younger brothers) of the greatest impartiality and justice. But when the emperors began to create honorary feuds or titles of nobility, it was found necessary, in order to preserve their dignity, to make them impartible, or, as they styled them, *feuda individua*, and in consequence descendible to the eldest son alone (*c*). This example was further enforced by the inconveniences that attended the splitting of estates: namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business or idleness of a country life; instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments (*d*). These reasons occasioned an almost total change in the method of feudal inheritances abroad, so that the eldest

(*y*) Litt. s. 5; Hale's Hist. C. L. c. 11. As to coparceners, vide sup. p. 346.

(*z*) Selden de Succ. Ebr. c. 5.

(*a*) Leg. Hen. 1, c. 70.

(*b*) Glanv. l. 7, c. 3.

(*c*) 2 Feud. 55.

(*d*) Hale's Hist. C. L. c. 11.

[male began universally to succeed to the whole of the lands, in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror. Yet we find that socage estates frequently descended to all the sons equally, so lately as when Glanville wrote, in the reign of Henry the second (*e*); and it is mentioned in the Mirrour, as a part of our antient constitution, that knight's fees should descend to the eldest son, and socage fees should be partible among the male children (*f*). However, in Henry the third's time we find by Bracton, that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands (*g*); except, indeed, in Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons (*h*),—and except, also, in some particular manors and townships, where their local customs continued their descent, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the antient law; for being all equally incapable of performing any personal service, and therefore one main reason for preferring the eldest not applying, such preference would have been injurious to the rest; and the other principal purpose (the prevention of the too minute subdivision of estates) was left to be considered and provided for by the lords, who had the disposal of these heiresses in marriage. However, the succession by primogeniture, even among females, takes place as to the inheritance of the *crown;* wherein the necessity of a sole and determinate succession is as great in the one sex as in the other (*i*). And the right of sole succession, though not of primogeniture, is also established with respect to female dignities and titles of honour. For if a man hold an earldom to him and the

(*e*) Glanv 1. 7, c. 3.
(*f*) Mirrour, c. i. s. 3.
(*g*) Bract. lib. ii. c. 30, 31.
(*h*) Somner, Gavelkind, 7.
(*i*) Co. Litt. 165 a.

[heirs of his body, and die, leaving only daughters, the eldest shall not, as a matter of course, be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases (*k*); in which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogeniture even among the males was established; viz. that the lord might bestow them on which of the sons he thought proper; "*progressum est ut ad filios deveniret, in quem scilicet dominus vellet beneficium confirmare*" (*l*).]

The last Rule supposed all the children of the purchaser to be living at his decease; but in the case of the death of any of them, then—

IV. A fourth Rule is, that the issue of the children of the purchaser *represent* or take the place of their parents *in infinitum;* the children of the same parent being always subject (among each other) to the same law of inheritance as contained in the third Rule.

[Thus the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son, and so *in infinitum;* and these representatives shall take neither more nor less, but just so much as their principals would have done (*m*). As if there be two sisters, Margaret and Charlotte, and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue; these six daughters shall take among them exactly the same as their mother Margaret would have done had she been living,—that is, a moiety of the land of John Stiles, in coparcenary; so that upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one a-piece.

(*k*) Co. Litt. 165 a.
(*l*) 1 Feud. 1.
(*m*) Hale's Hist. C. L. c. 11.

[This taking by representation is called succession *per stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also, was the Jewish succession directed (*n*). In our law, indeed, it is a necessary consequence of the double preference given, first, to the male issue, and next to the first-born among the males. For if all the children of three sisters were to claim *per capita*, in their own right, as next of kin to the ancestor, without any respect to the stocks from whence they sprung,—and those children were partly male and partly female,—then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which, by the first rule, it gives to the males and the first-born, in the descent to issue. Whereas by dividing the inheritance according to the roots or stirpes, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself, if living, would have done; but the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same: and among these several issues or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves—the sons or daughters of the deceased. As if a man hath two sons, A. and B., and A. dies, leaving two sons, and then the grandfather dies: now the eldest son of A. shall succeed to the whole of his grandfather's estate; and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But if a man hath only three daughters, C., D. and E., and C. dies, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who

(*n*) Selden de Succ. Ebr. c. 1.

[is younger than his sister; here, when the grandfather dies, the eldest son of C. shall succeed to one-third, in exclusion of the younger; the two daughters of D. to another third, in coparcenary; and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

Yet this right does not appear to have been thoroughly established in the time of Henry the second, when Glanville wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased), in regard to the inheritance of their common ancestor; for the uncle is certainly nearer of kin to the common stock, by one degree than the nephew, though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief, and besides had frequently superior interest and strength to back his pretensions and crush the right of his nephew. And even in times comparatively modern, we find that proximity of blood occasionally took the place of representative primogeniture, *e. g.* in lower Saxony, where the younger surviving brother was admitted to the inheritance before the son of an elder deceased,—which occasioned the disputes between the two houses of Mecklenburg-Schwerin and Strelitz, in 1692 (*o*). Yet Glanville with us, even in the twelfth century, seems to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, or (as the civil law would call it) had not been forisfamiliated in his lifetime (*p*). King John, however, who kept his nephew Arthur from the throne, by disputing the right of representation, did all in his power to abolish it throughout the realm (*q*); but in

(*o*) Mod. Un. Hist. xlii. 334.
(*p*) Glanv. l. 7, c. 3.
(*q*) Hale's Hist. C. L. c. 11.

[the time of his son, King Henry the third, we find the rule indisputably settled in the manner we have here laid it down (*r*).] And thus much for descents to the *issue* of the purchaser.

V. A fifth Rule is, that on failure of the issue of the purchaser, the inheritance shall descend to the nearest lineal ancestor then living in the preferable line;—supposing no issue of a nearer deceased ancestor in that line to exist.

Under this Rule we are to remark, that,

1. After the issue, the next descent is to the lineal ancestry.

This principle is but recently adopted into our law (*s*), which, on failure of descendants of the deceased, would admit the descendants of his lineal ancestor (that is, his own collateral heirs,) under colour of a fiction formerly explained (*t*); but always excluded the lineal ancestor himself: so that the land would rather escheat to the lord than ascend to a father or a grandfather (*u*); to illustrate which the inheritance of an estate is compared, by an antient writer, to the descent of a falling body. "*Descendit jus* (says Bracton) *quasi ponderosum quid, cadens deorsum rectâ lineâ; et nunquam re-ascendit eâ viâ quâ descendit*" (*x*). This resulted, like many other of our institutions, from the doctrines of feudal tenure. [For it was an express rule of the feudal law, that "*successionis feudi talis est natura quod ascendentes non succedunt*" (*y*), and we find the same principle recognized in

(*r*) Bract. lib. ii. c. 30, s. 2.

(*s*) It was, however, the rule among the Anglo-Saxons. See Hallam's Middle Ages, vol. ii. p. 467, 7th ed., citing Leges Hen. 1, c. 70.

(*t*) See Rule I.

(*u*) Litt. s. 3.

(*x*) Bract. lib. ii. c. 29. It has been remarked that the words *ea viâ quâ descendit* are a necessary qualification. For the inheritance might ascend *indirectly*, as from the son to the uncle.—Coleridge's Blackstone, vol. ii. p. 212, (n.)

(*y*) 2 Feud. 50.

[the old law of France (*z*). Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line (*a*); but this soon fell again into disuse, for so early as Glanville's time we find it laid down as an established law, that *hæreditas nunquam ascendit* which from that time remained an invariable maxim (*b*). These circumstances evidently show this antient peculiarity of our law to be of feudal original, and taken in that light, there were some arguments in its favour. For if the feud of which the son died seised was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent before it could have come to the son, unless indeed it were *feudum maternum*, or one descended from his mother, and then the father would be excluded by the feudal maxim already considered, as he did not derive his blood from the purchaser. And if it were *feudum novum*, or one newly acquired by the son, the father would still be excluded by the same maxim: which was founded not only upon the personal merit of the vassal which might be transmitted to his children, but also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, such a feud must in all respects have descended as if it had been really an antient feud; and therefore could not go to the father, because if it had been an antient feud, the father must have been dead before it could have come to the son. Thus, whether the feud were strictly *novum* or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in

(*z*) Domat, part 2, lib. 2; Montesq. Esp. des Lois, lib. 31, c. 33.

(*a*) Ll. Hen. 1, c. 70; Blackborough *v.* Davis, 1 P. Wms. 40.

(*b*) See Glanv. (temp. Hen. 2), lib. 7, c. 1.

[none of these cases could the father possibly succeed (*c*).] Such at least have been alleged, (and apparently with truth,) as the reasons of the rule which excluded the ascending line (*d*). The reasoning, however, was not consistently applied: for it has been justly observed, that if the father is not to inherit the estate, because it must be presumed to have already passed him in the course of descent, the elder brother should, upon the same principle, never be heir to the younger; and if the object is merely to pass over a decrepit feudatory, the father's eldest brother should never succeed to his nephew; and yet a succession in both these collateral lines was always permitted by law (*e*). The rule besides was opposed to natural justice, and the common feelings of mankind: which evidently suggest not only that a man's progenitors should be allowed to inherit his estate, but that their proper place in the succession is second only to that of his posterity. Such accordingly is now the rule; and we owe this great improvement to the Inheritance Act of 3 & 4 Will. IV. c. 106, to which we have already had occasion to refer. Its provision on this subject is as follows: "that every lineal ancestor shall be capable of "being heir to any of his issue; and in every case where "there shall be no issue of the purchaser, his nearest "lineal ancestor shall be his heir, in preference to any "person who would have been entitled to inherit, either by "tracing his descent through such lineal ancestor, or in "consequence of there being no descendant of such lineal "ancestor (*f*): so that the father shall be preferred to a "brother or sister, and a more remote lineal ancestor to "any of his issue other than a nearer lineal ancestor or his "issue" (*g*).

(*c*) 2 Bl. Com. 212.

(*d*) See Co. Litt. by Harg. 11 a, n. (1).

(*e*) Bl. Com. ubi sup.

(*f*) In this statute the expression "*descendants*" of any ancestor, "shall extend to all persons who must trace their descent through such ancestor." (3 & 4 Will. 4, c. 106, s. 1.)

(*g*) Sect. 6.

2. The descent is to the nearest living ancestor in the preferable line.

How the preference is to be settled between two different lines of ancestry, will appear by the next Rule. But in the mean time we are to observe, that in the same line the nearest of blood has the precedency.

Thus, if in failure of the issue of John Stiles, we proceed to inquire for his heir, among his lineal ancestors, we are to prefer Geoffrey Stiles, his father, to George, his grandfather (supposing both to be living); and so we are to prefer Lucy, his mother, to Esther, his maternal grandmother (*h*).

This branch of the Rule, though in a direct sense also resting on the same positive enactment, is not, like the other, new in its *principle*, but agrees in substance with the law as it stood prior to the Inheritance Act. For though the lineal ancestors were not themselves permitted to succeed, yet they were always regarded as the fountains of inheritable blood, and the stocks from which the next succession must spring, so that their issue were admitted, in right of descent from *them*, to the inheritance (*i*); and as to their issue, the rule was, that the descendants of a nearer lineal ancestor, in the preferable line, were preferred to those of one more remote (*j*). Very similar to which, as Blackstone observes, was the law of inheritance among the antient Germans our progenitors, "*hæredes successoresque sui cuique liberi, si nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi*" (*k*).

3. The Rule applies only in the event of the issue of every nearer deceased ancestor in the same line being extinct. For if the issue of any such ancestor exist, the order of succession is governed, as we shall see hereafter, by a different rule.

(*h*) See Table of Descent (No. II.).
(*i*) 2 Bl. Com. 226.
(*j*) Ibid.
(*k*) Ibid. citing Tacitus de Mor. Germ. 21.

VI. It may be laid down as a sixth Rule, that, among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor male or female,) is always preferred to the maternal.

Therefore Geoffrey, the father, in the annexed Table of Descent, (No. II.,) will succeed rather than Lucy, the mother; and if Geoffrey be dead, any of his male ancestors, George, Walter, and Richard, (according to their proximity,) will have the preference to any of his maternal ancestors, or to the maternal ancestors of George, or Walter respectively; though, on the other hand, all these maternal ancestors will take precedence of Lucy, the mother, or any ancestor of hers. Upon the same principle, when upon failure of the male line of John's paternal ancestry, by the extinction of the blood of Richard, we inquire for the next heir—we are to select Ann Godfrey, the mother of the more remote male paternal ancestor, in preference to Christian Smith, the mother of a male paternal ancestor less remote; for if we were to give the preference to Christian, we should be resorting to the maternal line of George, instead of his paternal, which would be contrary to our rule.

This preference of the paternal line, is now founded on the express enactment of the Inheritance Act (3 & 4 Will. IV. c. 106); which provides, (by sect. 7,) "that none "of the maternal ancestors of the person from whom the "descent is to be traced, nor any of their descendants, "shall be capable of inheriting, until all his paternal "ancestors and their descendants shall have failed (*l*); and "also that no female paternal ancestor of such person, "nor any of her descendants, shall be capable of inherit-"ing until all his male paternal ancestors and their de-"scendants shall have failed; and that no female maternal "ancestor of such person, nor any of her descendants,

(*l*) As to what proof of such failure is required, see Greaves *v.* Greenwood, Law Rep., 2 Ex. D. 289.

"shall be capable of inheriting until all his male mater-
"nal ancestors and their descendants shall have failed."
Moreover, by section 8 of the same Act, "where there shall
"be a failure of male paternal ancestors of the person from
"whom the descent is to be traced, and their descendants,
"the mother of his more remote male paternal ancestor,
"or her descendants, shall be the heir or heirs of such
"person in preference to the mother of a less remote male
"paternal ancestor, or her descendants; and where there
"shall be a failure of male maternal ancestors of such
"person, and their descendants, the mother of his more
"remote male maternal ancestor, and her descendants,
"shall be the heir or heirs of such person in preference to
"the mother of a less remote male maternal ancestor, and
"her descendants."

The first of these sections is a mere adoption of the principle of the former law, under which the blood of the paternal ancestor of the purchaser was constantly preferred to that of the maternal; the blood of the male paternal ancestor of the purchaser to that of the female paternal; and the blood of the male maternal to that of the female maternal (*l*).

[In the preference of relatives *ex parte paternâ*, the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden (*m*), and Petit (*n*); though among the Greeks in the time of Hesiod (*o*), when a man died without wife or children, all his kindred, without any distinction, divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the Emperor Justinian abolished all distinction between them (*p*). It is also conformable to the customary law of antient Nor-

(*l*) 2 Bl. Com. 234.
(*m*) De Succ. Ebr. c. 12.
(*n*) LL. Attic. Lib. 1, tit. 6.
(*o*) Θεογονία, 606.
(*p*) Nov. 118.

[mandy, which indeed in most respects agrees with our English law of inheritance (*q*).]

The principle no doubt originated (with us) in that maxim of the antient feudal institutions, to which we have already more than once referred,—that the heir must in all cases derive his blood, that is, be lineally descended, from the purchaser. An actual adherence to this rule would have excluded altogether both the lineal ancestors and collateral relations of a man who died tenant of land which he had acquired by *purchase;* but where his estate therein was in fee simple, his collateral relations were nevertheless (as we have seen) let in by the aid of a fiction which supposed him to hold it as a feud of indefinite antiquity; in other words, to have acquired it, not by purchase, but by *descent* from an unknown antecedent purchaser, at some former period (*r*). The collaterals (however remote) were thus admitted, because they might be supposed to descend from this unknown purchaser, so as to satisfy the feudal maxim; but upon the same principle those collaterals who would be most likely to have descended from him (supposing such an ancestor to have existed) were entitled to have the preference over those whose pretensions would be less probable. Now the collaterals of the last tenant, *ex parte paternâ*, would be more probably of the blood of this unknown purchaser, than those *ex parte maternâ;* because the estate presumably came to the last tenant through his male progenitors rather than his female. For, as, by the third and fourth Rules (which are founded on the common law, and have always prevailed), males are constantly preferred (in the course of descent) to females, it is more likely that the land should have belonged to his father, than to his mother; to his father's father than to his father's mother; and so continually upwards.

As to the 8th section of the Inheritance Act, it settled a question which had formerly been the subject of much

(*q*) See Gr. Coustum. c. 25. (*r*) Vide sup. p. 394.

controversy. For though the universal preference of the stocks in the male paternal line was always free from doubt, yet where, upon failure of the male paternal line, it became necessary for the first time to resort to a female stock, it was an unsettled point whether the descent should be traced through the mother of the nearer or of the more remote ancestor in that line. Thus it was disputed, whether the issue of the paternal grandfather's maternal grandfather, or the issue of the paternal grandmother's father, were the true heir of the purchaser (*s*). According to many old authorities, including Lord Bacon and Sir Matthew Hale, the latter had the better claim, it being held by these writers (in conformity with a more antient opinion), that all the female ancestors, on the part of the father, were equally worthy of blood, and that in that case *proximity* should prevail (*t*). Blackstone, however, had dissented from that doctrine (*u*); and his view would seem to be the more correct one; for, reverting to what has been just said of the fiction by which collaterals were introduced into the succession, it will appear, that as we are led by a chain of successive presumptions to suppose the estate of John Stiles, in the annexed Table of Descent (No. II.), to have descended from his father Geoffrey, rather than his mother Lucy, and from his grandfather George Stiles, rather than his grandmother Cecilia Kempe; so, if it did not descend to George, from Walter his father, the next presumption would be, that it descended from his mother Christian Smith, who again would presumably derive it from her father William; so that the issue of William Smith, the paternal grandfather's maternal grandfather, would necessarily have better title than the issue of Luke Kempe, the paternal grandmother's father, who stands lower (if we may so speak) in the chain of presumptions.

But whatever may have been the merits of this question,

(*s*) See First Real Property Rep. p. 11.

(*t*) See Bac. Elem. c. 1; Hist. Com. Law, c. 11.

(*u*) 2 Bl. Com. 238; see Davies *v.* Lowndes, 5 Bing. N. C. 169.

it is now set at rest by the 8th section of 3 & 4 Will. IV. c. 106, above referred to, which, in accordance with the view taken by Blackstone, prefers the maternal line of the more remote male paternal or male maternal ancestor, to the maternal line of the nearer, both as regards the issue of lineal ancestors, and the lineal ancestors themselves, now first introduced into the succession

VII. A seventh Rule is, that where an ancestor, to whom, if living at the purchaser's death, the inheritance would, according to the fifth Rule, have descended, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum* shall represent him, according to the same law of succession as before laid down with respect to the issue of the purchaser; but with this addition, that those related by the whole blood to the purchaser, are preferred to those related by the half-blood.

It is obvious from the nature of consanguinity, which means a descent from the same common ancestor, that, as regards the purchaser, the issue of his lineal ancestor are necessarily his collateral kindred, and that such one of them as becomes his heir, in capacity of issue to his ancestor, must inherit as collateral heir to himself. The seventh Rule thus transfers us from the subject of *lineal* inheritance (to which alone our preceding Rules referred) to that of collateral inheritance.

On the subject of collateral inheritance, it deserves remark, in the first place, that the right of collaterals no longer depends (as it formerly did) on the fiction that the estate of the purchaser was granted as a feud of indefinite antiquity, but on a positive statute-law of descent (*y*). For the Inheritance Act has now by express provision introduced both the "lineal ancestors" of the purchaser and their "descendants" into the succession (*z*). Indeed, when the right of the former was established, that of the

(*x*) See First Real Property Rep. p. 14.

(*y*) Vide sup. p. 394.

(*z*) 3 & 4 Will. 4, c. 106, ss. 7, 8.

latter would follow of course, upon the common law principle of representation. It would seem, therefore, that an estate purchased in fee simple can no longer be considered as granted to hold *ut feudum antiquum*, but rather as a new feud, with inheritable properties different from those which attached to a new feud under the antient system; being descendible not only to those who derive their blood from the purchaser, but those also from whom he derives his, and to their descendants.

It is also to be observed, that the right of collaterals is now referable universally, and in every case, to that of the ancestor from whom they descend; and it is only in his right, that they can ever be considered as heirs to the purchaser. Under the former system this was subject, in a particular case, to exception, it being held that between brothers and sisters, the descent was to be considered, for some purposes, as *immediate* (*a*). But by the new Act, no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent (*b*).

But to revert to the Rule under consideration.

First, the issue of the purchaser's lineal ancestor represent him *in infinitum;* and that according to the same law of succession as prevails among the issue of the purchaser.

Thus, if John Stiles, in the annexed Table of Descent (No. II.), purchases land, and dies entitled to the same, without issue, and his father Geoffrey be dead, it descends to Francis (the eldest son of Geoffrey, and the brother of John), rather than to George the grandfather; or if Francis be also dead, leaving several children, then to the eldest son of Francis, the nephew of John, and does not pass to any remoter ancestor of John, unless the issue

(*a*) 2 Bl. Com. 226; Watk. Desc. 111, n.; H. Chit. Desc. 64, 354; Kynnaird *v.* Leslie, Law Rep., 1 C. P. 389.

(*b*) 3 & 4 Will. 4, c. 106, s. 5.

of Geoffrey are exhausted. So, it will descend to a son, or even a *daughter* of Francis (if he left no son) rather than to Oliver Stiles, the brother of John; for such son or daughter represents the father, who, as the eldest son of Geoffrey, represented *him*.

This branch of the Rule is open, in general, to the same remarks as those which have been already made under Rules III. and IV., and will require no further discussion; though it may be worth while to notice the correspondence of the Jewish law with ours in this particular, as well as in the representation among the issue of the deceased (*c*); for on failure of issue, the father or other lineal ancestor was himself said to be the heir, though long since dead, as being represented by the persons of his issue, who were held to succeed, not in their own rights, as brethren, uncles, (or as the case might be,) but in right of representation, as the offspring of the father, grandfather, or other ancestor of the deceased (*d*).

As to the remaining branch of the Rule, viz., that which regards the distinction between the whole and half-blood,—it results from the first branch thereof (taken in connection with Rule VI.) that the collateral heir of the purchaser is the issue of the nearest of his lineal ancestors in the preferable line, who has left posterity living at the death of the purchaser; subject to the principles as to sex, primogeniture, and representation. But among such issue, some may be relations to the purchaser of the whole blood, and some of the half-blood only; and it is consequently necessary to lay down an additional principle to determine whether both these classes are admissible, and whether any and what precedency is to be allowed between them.

[A kinsman of the whole blood, is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For every man's blood is compounded of the bloods of his respective ancestors; and he only is of the

(*c*) 2 Bl. Com. 226. (*d*) Num. c. 27; Seld. de Succ. Ebræor. c. 12.

[whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredients in the composition of his blood, that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, has entirely the same blood with John Stiles, that is to say, he is his brother of the whole blood (*e*). But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him, the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay instead of Geoffrey Stiles on the other part, it hath therefore only half the same ingredients with that of John Stiles, so that he is only his brother of the half-blood.] So also if the father has two sons, A. and B., by different wives (or, according to the technical expression, by different venters), now these brethren are not brethren of the whole blood, but of the half-blood only.

The Inheritance Act assigns to such of the purchaser's collateral kinsmen as are of the whole blood, and their issue, the preference to those who are of the half-blood only, in the same degree, but admits the latter to the next place in the succession (*f*). Thus if the father have a son A., by one wife,—and two sons, B. and C., and a daughter, by a second wife,—and B. purchase land, and die without issue, and the father be also dead, C., the younger brother, or, on failure of C. and his issue, the sister, shall succeed in preference to A., the elder brother. But the latter (though only of the half-blood) and his issue, will succeed in preference to any collateral relation not descended from B.'s father, though of the whole blood with B. So on the death of John Stiles the purchaser, in the annexed Table (No. II.), without issue, his father Geoffrey being also dead, he will be succeeded, not only by his elder brother Francis, or his second brother Oliver,

(*e*) Table of Descent (No. II.). (*f*) 3 & 4 Will. 4, c. 106, s. 9.

but even by his sisters Bridget and Alice, in preference to his half-brother, the son of his mother Lucy and Lewis Gay, who cannot indeed inherit until the paternal line are exhausted; for his mother, whom he represents, could not (by the sixth Rule) have taken while any of the paternal line remained. But the son of Lucy and Lewis Gay (and his issue after him) will stand next to his mother, in the order of succession, and in preference to any other collateral relation of John Stiles *ex parte maternâ*, though of the whole blood with John Stiles.

In the admission of the half-blood, the Inheritance Act introduces a new principle of inheritance; for, as the law before stood, the half-blood (like the lineal ancestor) were totally excluded, and the land would rather escheat to the lord than go to any kinsman (however near), bearing that kind of relationship to the person from whom descent was to be traced. Therefore A. in one of the cases just supposed, and the son of Lucy and Lewis Gay in the other, would have been absolutely incapable of the succession. Nay, even when a father died, and his lands descended to his eldest son A., who entered thereon, and died seised without issue, still B., the son of the same father by another wife, could not be heir to these lands, because he was only of the half-blood to A., the person last seised; but they would descend to a sister (if any) of the whole blood to A., for in such cases the maxim was, that *possessio fratris facit sororem esse hæredem*. Yet if A. had died without entry, then B. might have inherited; not as heir to A. his half-brother, but as heir to their common father, who was the person last actually seised (*f*).

This exclusion of the half-blood was a feature almost peculiar to the law of England; and (it must be added) one of the most harsh and unreasonable aspect. Its vindication rested entirely upon the plea that it ought to be considered as a mere auxiliary rule, to carry into effect that principle of the feudal law which required the

(*f*) 2 Bl. Com. 227.

heir to derive his blood from the purchaser. For as it was a consequence from this principle (as already shown), that the collaterals of the deceased purchaser could only be let in by supposing them to be lineal descendants of some one of his ancestors, from whom the estate had been originally derived; so it was obvious that those related to him of the whole blood were in general more proper subjects for that supposition, than those of the half-blood. This results from the consideration that he who is the kinsman of the whole blood to the person deceased can have no ancestors beyond or higher than the common stock, but what are equally the ancestors also of the deceased, and *vice versâ;* and therefore is very likely to be derived from that unknown ancestor of his from whom the inheritance is supposed to have descended. But a kinsman of the half-blood in the same degree with the other, is not so probably sprung from the same original purchaser; for he has but one-half his ancestors, beyond or higher than the common stock, the same with those of the deceased.

To illustrate this by example (*g*):—Let there be John Stiles and his brother Francis, by the same father and mother, and another brother born of the same mother by Lewis Gay, a second husband. Now if John die seised of lands, but it is uncertain whether they descended to him from his father or mother, in this case his brother Francis of the whole blood is sure to be in the line of descent from the first purchaser, whether it were the line of the father or mother. But his half-brother by Lewis Gay is to the full as likely not to be descended from the original purchaser as to be descended, and there is consequently no reasonable presumption of his being derived from the original purchaser. It was argued, therefore, by the apologists of the antient rule of exclusion, that it should not be thought hard that collateral relations of the half-blood should be disinherited; for as they owed their admission only to the fiction that they were the issue of

(*g*) 2 Bl. Com. 228.

an imaginary purchaser, it was just to exclude them in every case where, supposing that purchaser to have really existed, there would be no fair reason to suppose that they could in truth have descended from him (*h*). It was obvious, however, even to the apologists themselves, that the exclusion was carried further in practice than the principle on which it was founded would warrant; for a kinsman of the half-blood to the deceased, supposing him to have derived the estate from some unknown ancestor, would in some instances have the same chance of being descended from that ancestor as a kinsman of the whole blood in a remoter degree, and in other instances a much greater. Thus a brother of the half-blood would have the same chance as an uncle of the whole, on the same side, and more than a great uncle; and yet, in these instances, the remoter kinsman was always admissible, while the nearer was incompetent to succeed. The rule of exclusion was, besides, applied even where the deceased tenant did not take by purchase, but by descent, and had a relative of the half-blood known to be descended as well as himself from the purchaser;—as in the case already noticed, where upon the death of A. without issue, seised of lands which had descended to him from his father, his half-brother B., son of the same father, was debarred from the inheritance. This was universally allowed to carry a hardship with it, even upon feudal principles; for as the estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it was demonstrable that the half-brother must be of the blood of the purchaser, who was either the father or one of the father's ancestors. [And indeed it should seem as if originally the custom of excluding the half-blood, in Normandy, extended only to exclude a *frater uterinus* where the inheritance descended *a patre*, and *vice versâ;* and possibly in

(*h*) See note by Christian, 2 Bl. Com. 231.

[England also (*i*): as even with us it remained a doubt in the time of Bracton and of Fleta whether the half-blood on the father's side was excluded from the inheritance which originally descended from the common father; or only from such as descended from the respective mothers, and from newly-purchased lands. So also the rule of law, as laid down by our Fortescue, extends no further than this, *frater fratri uterino non succedet in hæreditate paternâ* (*k*). It is moreover worthy of observation, that the crown (which is the highest inheritance in the nation) has always been held capable of descending to the half-blood of the preceding sovereign (*l*), provided it be the blood of the first monarch of the reigning family who was *conqueror* (which in feudal language is the same as *purchaser*) of the realm (*m*). Thus it actually did descend from King Edward the sixth to Queen Mary, and from her to Queen Elizabeth, who were respectively of the half-blood to each other.] For though none can be a claimant to the crown unless known to be descended from the original stock—which was at one period King William the Norman, and is now, by act of parliament (12 & 13 Will. III. c. 3), the Princess Sophia of Hanover (*n*)—yet, when such descent is known, the feudal rule is satisfied, whether he be related to the last sovereign by the whole, or by the

(*i*) Gr. Coustum. c. 25.

(*k*) Fort. De Laud. Leg. Ang. c. 5. With respect to the exclusion of the half-blood in England, Sir H. Maine, in his "Antient Law," asserts that it arose from the adoption into England of the customs of Normandy, which borrowed from antient Roman law the rules of *agnation* forbidding kinship to exist between any not subject to the same *patria potestas*, and consequently excluding all the descendants of *females* from participating in the *agnatic kinship*. And he holds, that this rule being transplanted to England, the judges, ignorant of its source, extended it to a general prohibition against the succession of the half-blood, instead of limiting it, as originally intended, to *uterine* brothers. (See Maine, pp. 151, 152.)

(*l*) Plowd. 245; Co. Litt. 15 b.

(*m*) Vide sup. p. 386.

(*n*) 2 Bl. Com. 233. As to the settlement of the succession by this statute, see further, post, bk. IV. pt. I. c. III.

half-blood. And upon the same principle, in titles of honour (*o*) and in all estates tail (*p*), half-blood was never an impediment to the descent; because, in these cases, the pedigree from the first donee must be strictly proved: and the feudal maxim is consequently carried into effect, without resorting to any auxiliary rule. But now, as we have seen, the maxim which excluded the half-blood has given way, in *every* case, to a sounder and more satisfactory principle. For having been long generally disapproved, as founded on defective reasoning and opposed to natural justice, it was at length abolished by the Inheritance Act, the provision of which, as regards this subject, is expressed in the following terms:—"That any person related to the "person from whom the descent is to be traced by the "half-blood shall be capable of being his heir; and the "place in which any such relation by the half-blood shall "stand in the order of inheritance, so as to be entitled "to inherit, shall be next after any relation in the same "degree of the whole blood and his issue, where the "common ancestor shall be a male, and next after the "common ancestor where such common ancestor shall be "a female; so that the brother of the half-blood on the "part of the father shall inherit next after the sisters of "the whole blood on the part of the father and their "issue, and the brother of the half-blood on the part of "the mother shall inherit next after the mother" (*q*).

Having now treated of descent in general, we next arrive at the few and rare cases formerly referred to as requiring a separate consideration.

First, then, there are cases in which a man may acquire land by purchase, under a limitation to the "heirs," or "heirs of the body," of one of his ancestors.

Thus if the owner of lands conveys them to A. for life,

(*o*) Co. Litt. 15.
(*p*) Litt. ss. 14, 15 b.
(*q*) 3 & 4 Will. 4, c. 106, s. 9.

remainder to the "heirs" or "heirs of the body" of B., and B. be then deceased, or be then living but die during the continuance of the particular estate (*r*), the person who at the time of the conveyance in the first case, or at the time of B.'s death in the second, answers the description of his "heir" or "heirs of his body," will, by the rule of the common law, take the remainder as purchaser, and his estate will be a fee simple or fee tail, as the case may be; for such words amount *not only to a description of the grantee, but to a limitation of the estate* which he is to take (*s*). By the Inheritance Act, however, the estate so acquired by purchase is anomalous as regards its descendible quality; for by the 4th section, "When any person shall "have acquired any land by purchase under a limitation "to the heirs or to the heirs of the body of any of his "ancestors, contained in an assurance executed after the "31st December, 1833; or under a limitation to the heir "or heirs of the body of any of his ancestors (or under "any limitation having the same effect) contained in a "will of any testator who shall depart this life after the "said 31st December, 1833; then and in any of such "cases, such land shall descend, and the descent of it shall "be traced, *as if the ancestor named in such limitation had "been the purchaser.*"

Secondly (in reference to the case just supposed), it is provided by a more recent statute, viz., the 22 & 23 Vict. c. 35, s. 19, that "Where there shall be a total failure "of heirs of the purchaser, or where any land shall be "descendible as if an ancestor had been the purchaser "thereof, and there shall be a total failure of the heirs "of such ancestor, then and in every such case the land "shall descend, and the descent shall thenceforth be traced

(*r*) If B. were to survive A., the limitation in remainder would fail for want of a person to take, for *nemo est hæres viventis*, vide sup. p. 389.

(*s*) Co. Litt. 10 a, 319 b; 1 Roll. Abr. 627; 2 Bl. Com. 241; 1 Prest. Est. 280, 452, 453.

"from *the person last entitled to the land, as if he had been* "*the purchaser thereof*" (*t*).

Having now brought our account of the present law of descent to a close, we may remark, as the result of the investigation, that, upon the death of the owner of an estate in fee simple, we are to ascertain the heir, by considering, first, who was the *purchaser* or *quasi* purchaser of that estate,—meaning by the term *quasi* purchaser, the person from whom descent is to be traced *as if he had been the purchaser*, as in the two cases just noticed:—and we are then to look for the heir, first, among his issue,—where the heir will be his descendant next to him in blood, but subject to the principles which obtain as to sex, primogeniture, and representation: and, failing his issue, among his lineal ancestors or their issue—where the heir will be his lineal ancestor next in blood in the preferable line, or the issue of such ancestor, if deceased; applying the same law of succession as in the case of the purchaser's issue, and also the principle which prefers the whole to the half-blood.

Before we conclude this branch of our inquiries, however, it may not be amiss to *apply* the rules more particularly, and to supply the reader with a short sketch of the manner in which we must search for the heir of a person,—as John Stiles,—who dies entitled to land, of which he was the purchaser or *quasi* purchaser (*u*).

In the first place succeeds the eldest son, Matthew Stiles, or his issue, No. 1. If he and his heirs be extinct, then Gilbert Stiles, and the other sons respectively in order of birth, and their issue, No. 2. In default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue, No. 3. On failure of the descendants of John Stiles, his father Geoffrey (being his nearest lineal ancestor in the preferable line) is admitted, No. 4. Then

(*t*) The object of this provision will appear in the next chapter, p. 438.

(*u*) See Table of Descent (No. II.).

the issue of his father, viz., first, Francis Stiles, the eldest brother of the whole blood or his issue, No. 5; then Oliver Stiles and the other whole brothers respectively, in order of birth, or their issue, No. 6; then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue, No. 7; then the son of Geoffrey (the paternal brother of the half-blood), No. 8, or his issue; and the paternal sisters of the half-blood, No. 9, or their issue. In default of them, George Stiles, the paternal grandfather, is admitted, No. 10, and then his issue, viz., first, his issue of the whole blood with John, No. 11, then his issue of the half-blood with John, No. 12. In default of these, Walter Stiles, the paternal grandfather's father, is admitted, No. 13. Then the issue of Walter, viz., first, his issue of the whole blood with John, No. 14, then his issue of the half-blood, No. 15. In default of these, Richard Stiles, the paternal grandfather's paternal grandfather, is admitted, No. 16, or his issue, No. 17, and so on, in the paternal line of Walter Stiles, *in infinitum*. On failure of this line (this is supposing the decease of Richard, and of all his maternal and paternal ancestors, and the failure of their issue both of the whole and of the half-blood), we are next to resort to the maternal line of Walter Stiles, rather than of a nearer male ancestor; and the paternal grandfather's paternal grandmother, Ann Godfrey (according to the maiden name), No. 18, will consequently be the person next entitled to succeed, and so on in the maternal line of Walter Stiles, *in infinitum*. On failure of which we are to resort to the maternal line of George Stiles; and the paternal grandfather's mother, Christian Smith, No. 19, will be the person next entitled, and then her issue of the half-blood, to John, No. 20. Then the paternal grandfather's maternal grandfather, William Smith, No. 21; and then his issue, No. 22; and so on in the paternal line of Christian Smith, *in infinitum*. On failure of which, we are to resort to her maternal line; and the paternal grandfather's maternal

grandmother, Jane King, No. 23, will be the person next entitled, and so on in the maternal line of Christian Smith, *in infinitum*. On failure of which we are to resort to the maternal line of Geoffrey Stiles; and the paternal grandmother, Cecilia Kempe, No. 24, will be the person next entitled; and then her issue of the half-blood to John, No. 25. Then the paternal grandmother's father, Luke Kempe, No. 26; then his issue of the whole blood to John, No. 27. Then his issue of the half-blood to John, No. 28. Then the paternal grandmother's paternal grandfather, Thomas Kempe, No. 29. Then his issue, No. 30, and so on in the paternal line of Luke Kempe, *in infinitum*. On failure of which we are to resort to his maternal line; and the paternal grandmother's paternal grandmother, Sarah Browne, No. 31, will be the person next entitled; and so on in the maternal line of Luke Kempe, *in infinitum*. On failure of which we are to resort to the maternal line of Cecilia Kempe; and the paternal grandmother's mother, Frances Holland, No. 32, will be the person next entitled. Then her issue of the half-blood to John, No. 33. Then the paternal grandmother's maternal grandfather, Charles Holland, No. 34, then his issue, No. 35; and so on in the paternal line of Frances Holland, *in infinitum*. On failure of which, we are to resort to the maternal line of Frances Holland; and the paternal grandmother's maternal grandmother, Mary Wilson, No. 36, will be the person next entitled; and so on in the maternal line of Frances Holland, *in infinitum*. On failure of which, the paternal blood of John Stiles entirely failing, recourse must then, and not before, be had to his maternal relations, or the blood of the Bakers, Nos. 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47; the Bates's, No. 48; the Willes's, Nos. 49, 50, 51, 52; the Carters, No. 53; the Thorpes, Nos. 54, 55, 56, 57, 58, 59, 60; the Bishops, No. 61; the Whites, Nos. 62, 63, 64, 65; and the Wards, No. 66, in the same regular successive order as in the paternal line.

We have thus seen how land is acquired by descent in fee simple. But before we conclude the chapter, it will be proper to notice some miscellaneous points of law connected with title.

1. We may remark, that in order to make the title complete, where the estate descended is one in possession, the heir is required to make *entry* on the land; for until then he is said to have seisin in *law* only and not in *deed;* and is incompetent to bring any action of trespass for injuries committed to the land (*x*). If the estate be one in expectancy, he has of course no right of entry until the particular interest determines: but if it be a reversion or remainder immediately expectant on an estate for *years*, the possession of the particular tenant operates, upon a principle before explained, as that of the heir; whose seisin is in that case considered as a seisin in deed, and not in law only (*y*). The distinction, however, between these kinds of seisin, as regards the heir, has now lost the importance which arose from the consideration that until entry he could not become the root of a future descent; for this is a capacity which can no longer in any case attach to him, as, by the new provision of the Inheritance Act, the purchaser is now the only root from which descent can be traced (*z*).

2. It may be useful to explain the phrase which sometimes occurs in the books of *breaking* the descent. It is to be observed, then, that the estate which a man has acquired by descent, retains in his hands its former quality of descending only to the blood of the same purchaser, or *quasi* purchaser; so that, on decease of the

(*x*) Bac. Ab. Trespass (C.).

(*y*) Co. Litt. 15 a; Doe *v.* Keen, 7 T. R. 390; Doe *v.* Whichelo, 8 T. R. 213; et vide sup. p. 315.

(*z*) It may be noticed that in a recent case where the claimant grounded his title on a devise of real estate, "of which the testator was seised," and the testator, though he was seised in law as the heir of an intestate owner, had never obtained actual seisin by entry, it was held that under such a devise the property did not pass. (Leach *v.* Jay, Law Rep., 9 Ch. D. 426.)

owner, none of his relations on the mother's side can ever be entitled to succeed, supposing the estate to have descended to him in the paternal line, nor *vice versâ* any relation on the father's side, if it came in the maternal line; except only in the case of a relation who, being heir in one of these lines, happens to belong to the other also,—a case which may occur when the owner's parents have been connected by consanguinity. In this respect the title by descent differs remarkably from that by purchase; for by the latter the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, that is, first to those of the paternal, and then to those of the maternal line. And from this it follows, that if a person who has acquired an estate by descent convey it to a new purchaser, the line of descent is *broken;* and even if that purchaser convey it back again to him, the interruption still continues; for the former owner will then hold it as by purchase, and not as by descent, and will therefore be able to transmit it to his heirs on either side. Thus, if a man seised of lands as heir on the part of his mother (and which consequently no relation on the father's side can, as such, inherit), convey them to another, and afterwards obtain a reconveyance of them, to hold to him and his heirs, and then die without issue, his heirs on the part of his father shall inherit, and in preference to those on the mother's side (*a*). But a mere alteration in the quality or circumstances of an estate will not break the descent; and therefore if parceners make partition of their land, they are still *in* of their respective shares by inheritance, though those shares are no longer held in coparcenary, but in severalty.

(*a*) Co. Litt. 12 b; Doe *v.* Morgan, 7 T. R. 105; 1 Prest. Est. 420, 458, 459. And in like manner the descent will now be broken where a person who took by descent makes a conveyance (subsequent to 31st December, 1833), although an estate should be limited to *himself* by the same conveyance. (See the Inheritance Act, 3 & 4 Will. 4, c. 106, s. 3.)

3. An estate in fee simple descending on the heir, comes to him charged with the debts of the ancestor from whom it descended (*b*). This liability has always been recognized, in respect of such of the ancestor's obligations as (in legal language) have accrued by *specialty*, a term which includes an obligation accruing by "matter of record" (such as a judgment or other proceeding recorded in a court of justice) as well as an obligation arising on a deed, i. e., a contract under seal; though, unless the ancestor bound his heirs *eo nomine*, their liability was not held to be such as could be enforced in the courts of *law* (*c*). And the heir is not liable (whatever the kind of obligation of his ancestor may have been) to be charged as of his own proper debt; but only so far as he has taken, in his character of heir, an estate sufficient to satisfy the debt; which sufficient estate is called, in law, *assets*, from the French word *assez*, enough (*d*). But the assets which descend to an heir may consist either of legal or of equitable estate; and though equitable interests are not in general noticed at law, yet in this case it is otherwise: for by the Statute of Frauds (29 Car. II. c. 3), s. 10, if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heir, the trust shall be assets by descent, and the heir liable to be charged with the obligation of his ancestor by reason of such assets, as if the *legal* estate had descended in possession upon him.

But though the *heir* was thus subject to liability for the specialty debts of his ancestor (to the extent of the estate inherited), no such liability at one time attached to a *devisee*, that is to say, a person taking the estate of the deceased under his will; and therefore to protect creditors from such devises as might tend to their prejudice, it has been provided by statute 3 William and Mary, c. 14, called "The Statute of Fraudulent Devises" (*e*), that where a

(*b*) See Bushby *v.* Dixon, 3 Barn. & Cress. 298.

(*c*) See Harbert's case, 3 Rep. 12 b.

(*d*) 2 Bl. Com. 243, 244. The law on the subject of the heir's liability is fully stated, 2 Saund. by Wms. 7, n. (4).

(*e*) This Act was repealed, but

deceased person shall have devised any real estate, without making it subject to the payment of his debts, his devisee shall be liable to be charged in respect of the real estate so devised, in the same manner as, and jointly with, the heir: and a creditor, bringing an action for that purpose, shall be entitled either to make the devisee a joint defendant with the heir, or to sue the devisee alone, where there is no heir liable (*f*).

Still, however, no remedy existed against the real estate of a deceased person (whether in the hands of an heir or devisee), to creditors claiming upon *simple contract* (i. e., not under deed), or claiming under deeds in which the heirs were not expressly bound. There have been few defects perhaps in the English jurisprudence more calculated to excite surprise than this, or more at variance with the natural sense of justice. And it is satisfactory, therefore, to be able to add that it exists no longer; for, though it was not thought convenient to alter the principle of the *common law* in this particular, the claims of creditors of every class have been effectually secured through the medium of proceedings in *equity*. Yet the redress came late, and by a slow and cautious advance. For at first it was confined to the case where the deceased was a person carrying on trade within the meaning of the bankrupt laws; it being provided by 47 Geo. III. sess. 2, c. 74, and afterwards by 11 Geo. IV. & 1 Will. IV. c. 47, that, in a case of that description, the creditors by simple contract should be entitled by proceedings in equity, in such manner as therein mentioned, to enforce payment out of the real estate descending on his heir, or devised by his

with a re-enactment of the provision in the text, by 11 Geo. 4 & 1 Will. 4, c. 47—itself explained and amended, in some respects, by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87.

(*f*) As to these enactments, see Farley *v.* Briant, 3 Ad. & Ell. 839; Hunting *v.* Sheldrake, 9 Mee. & W. 256; Coope *v.* Cresswell, Law Rep., 2 Eq. Ca. 106; 2 Ch. App. 112.

will,—and not made subject to the payment of his debts. Subsequently, by 3 & 4 Will. IV. c. 104, it was enacted more extensively—that when *any* person should die entitled to any real estate, not by his will made subject to his debts, such estate should be considered as assets to be administered in equity, for payment of his debts as well on simple contract as on specialty. Under this Act, however, a priority was secured to those who in their lifetime had placed their claims upon a basis of stronger obligation, for it was further provided, that, in the equitable administration of assets, all creditors by specialty in which the heirs were bound *eo nomine*, should be paid in full before any creditors by simple contract, or claiming on specialties in which the heirs were not so bound. But by 32 & 33 Vict. c. 46, it has been since enacted that, in the administration of the estate of any person who shall die on or after 1st January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by an instrument under seal, or is otherwise made a specialty debt; but that all his creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of his assets, whether they be legal or equitable. There is, however, a proviso that this enactment shall not prejudice any lien, charge or other security which any creditor may hold for his debt (*g*). However, now, by the Judicature Act, 1875 (*h*), s. 10, it has been provided that as from the 2nd November, 1875, in the administration of the estates of deceased insolvents, the

(*g*) This Act is commonly known as "Hinde Palmer's Act." As to its construction, see Williams *v.* Williams, Law Rep., 15 Eq. Ca. 270; Shirriff *v.* Hastings, ib. 6 Ch. D. 610. It may be noticed that in 22 & 23 Vict. c. 35, will be found provisions to meet the case of a testator who, having charged his real estate with the payment of specific sums of money, has devised the estate so charged to trustees, without making express provision for the mode in which such money is to be raised out of the estate.

(*h*) 38 & 39 Vict. c. 77.

like rules shall prevail as in bankruptcy, as regards the mode of proof by secured and unsecured creditors, and as to the classes of debts and kinds of liability that are provable, and as to the valuation of annuities (*i*).

(*i*) See Smith *v.* Morgan, 5 C. P. D. 337; Withernsea Brickworks Co., 16 Ch. D. 337; In re Association of Land Financiers, 16 Ch. D. 373; In re Maggi, 20 Ch. D. 545; Hill *v.* Bridges, 17 Ch. D. 342.

CHAPTER XII.

OF TITLE BY ESCHEAT.

Escheat, we may remember, was one of the fruits and consequences of feudal tenure (*a*). The word itself is originally French or Norman, in which language it signifies chance or accident; but with us it is applied to the case where the owner of an estate in fee simple dies without having disposed of it, and leaves no heir behind him to take it by descent; so that it results back, by a kind of reversion, to the original grantor or lord of the fee (*b*). And here it is to be observed, that the land so escheating afterwards follows the seigniory, as being a fruit thereof. Therefore, if the lord was entitled to the seigniory by purchase, the land escheated will descend to his heirs general; if by descent, it will be inheritable only by such of his heirs as are capable of inheriting the seigniory (*c*).

In order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated; and on failure herein, or in doing any act that amounts to an implied waiver of his right, as by accepting rent of a stranger who usurps the possession, his title by escheat is barred (*d*). It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed, this may also be

(*a*) 2 Bl. Com. 244. Vide sup. pp. 184, 210.

(*b*) 11 Feud. 86; Co. Litt. 13 a.

(*c*) Co. Litt. ubi sup.

(*d*) Bl. Com. ubi sup.; Bro. Ab. tit. Acceptance, 25; Co. Litt. 268.

said of descents themselves, in which an entry or other seisin is required, in order to make a complete title; but as both descent and escheat vest an inchoate title at least in the party, without the active interference of any person whatever, they are both properly referable to the same head, of title by "act of law" (*e*).

The law of escheat is founded upon this single principle, that the inheritance of land held in fee simple having failed, it must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom (or by those whose estate he hath) it was given (*f*).

Escheats have been frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*; the one sort, if the tenant should die without an heir, the other, if his blood be attainted (*g*); and we propose successively to advert to both sorts, beginning with—

I. Escheats *propter defectum sanguinis*. By the law, as it stood till recently, an escheat of this sort took place,

First, where the owner in fee simple of land, of which he had been himself the purchaser, died without disposing of the same, and leaving none related to him by consanguinity, or none who was not subject to some disability such as prevented his becoming heir to any person whatever (*h*).

Secondly, where the owner in fee simple of land which he had derived by descent from some person as purchaser, (or which was descendible as if one of the owner's ancestors had been the purchaser,) died without disposing of the same, and leaving none related by consanguinity to such purchaser or ancestor, or none not subject to such disability as just mentioned (*i*).

(*e*) Vide sup. p. 386.
(*f*) 2 Bl. Com. 245.
(*g*) Co. Litt. 13 a, 92 b.
(*h*) As to the term "purchaser" in connection with the acquirement of land, vide sup. pp. 386, 391.
(*i*) Vide sup. p. 393.

But it has latterly been considered as a hardship that, in the second case, the land should thus go over by escheat to a stranger, if the last owner died leaving a person related to *him* by consanguinity, and able to take land as heir—a possible event—because he may have left a person falling under that description, though not a relation on the side of him from whom the land had descended, or was descendible (*j*). It has now therefore been provided by 22 & 23 Vict. c. 35, s. 19 (as stated in the last chapter), that where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then, and in every such case, the land shall descend, and the descent shall thenceforth be traced from the person last entitled to the land, as if he had been the purchaser thereof (*k*).

The law having been thus altered, an escheat now takes place only in the following cases,—First, where the person last entitled to land in fee simple dies without having disposed of the same, and leaving none related by consanguinity either to the person (if any) from whom as purchaser, (or as quasi purchaser,) he derived by descent,—or to himself. Secondly, where he dies without having disposed of the land, and leaving none so related who is not at the same time subject to a personal disability to take as heir. The first of these cases requires no further remark. As to the second, the persons who are under such disability, may be classed as follows:—

1. [A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body,

(*j*) As in Doe *d.* Blackburn *v.* Blackburn, 1 Moody & Robinson, p. 547.

(*k*) This provision is, by sect. 20, incorporated with the "Inheritance Act," as to which vide sup. pp. 391, 425.

[yet if it hath human shape, it may be heir. This is a very antient rule in the law of England, and its reason is too obvious and too shocking to bear a minute discussion (*l*). And if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

2. Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born of lawful wedlock (*m*). Such are held to be *nullius filii*, the sons of nobody; for the maxim of the law is, "*Qui ex damnato coitu nascuntur, inter liberos non computantur*" (*n*). Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently none of the blood of the first purchaser; and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord (*o*). The civil law differs from ours in this point, and allows a bastard by birth to succeed to an inheritance, if legitimated after it was born by the lawful marriage of its father and mother (*p*): and also if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance (*q*); and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not (*r*). But our law, in favour of marriage, is much less indulgent to bastards.

There is indeed one instance in which our law has shown them some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the

(*l*) See Co. Litt. 7 b; Bract. l. 1, c. 6, s. 7, and l. 5, tr. 5, c. 30, s. 10.

(*m*) "Bastards by our law are "such children as are not born "either in lawful wedlock or "within a competent time after "its determination."—2 Bl. Com. 247. See further as to bastardy, post, bk. III. c. III.

(*n*) Co. Litt. 8 a; Bract. ubi sup.

(*o*) Finch, Law, 117.

(*p*) Nov. 89, c. 8.

(*q*) Ib. c. 112.

(*r*) Cod. 6, 57, 5.

[language of the law is called a *mulier*, or, as Glanvil expresses it in his Latin, *filius mulieratus* (*s*); the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigné*: and the younger son is legitimate, or *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisné* and all other heirs (though minors, married women, or under any incapacity whatsoever) are totally barred of their right (*t*). And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the bastard's life and evicting him. 2. Because the canon law (following the civil) did allow such *bastard eigné* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shown to no other kind of bastard; for if the mother was never married to the father, such bastard could have no colourable title at all (*u*).

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For all collateral kindred consists in being derived from the

(*s*) L. 7, c. 1.

(*t*) Litt. s. 399. The rule also applies if a man has two *daughters*, the elder a bastard, and they both enter peaceably as co-parceners; Co. Litt. 244 a.

(*u*) Litt. s. 400. Blackstone (vol. ii. p. 248) here gives as an additional reason for the rule as to bastard *eigné*, that "the law will "not suffer a man to be bastar-"dized after his death, who entered as heir, and died seised, "and so passed for legitimate in "his lifetime." And the same reason is given in Co. Litt. 244 a. But the correctness of this view is questionable; for there is no other case in which the temporal courts allow the maxim, that a man shall not be bastardized after his death; see Co. Litt. by Butler, 244 b, n. (1).

[same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and consequently can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchase land, and die seised thereof without issue, and intestate, the land shall escheat to the lord of the fee (*x*).] But though the descent from a bastard is necessarily confined to his issue, yet he is capable of holding land in fee simple, in such sense at least that he may make an unlimited alienation of it (either by conveyance *inter vivos* or by way of devise), and that the alienee will take an estate to his heirs general (*y*).

3. As the law stood until a recent period aliens also, amongst other incapacities, were incapable of taking by descent; for they were not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal (*z*). And therefore, if a man left no other relations but aliens, his land escheated to the lord.

As aliens could not inherit, so far they were on a level with bastards; but as they were also disabled to hold real estate by *purchase*, they were under still greater disabilities (*a*). And as they could neither hold by purchase, nor by inheritance, so they could have no heirs, since they could have nothing for an heir to inherit (*b*).

Moreover, at one time, aliens could not be the *channels* of descent, for we are told by Sir Edward Coke, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects, and one of them purchases land and dies; yet neither of these brethren can be heir to the other (*c*). For (continues he) the *commune vinculum*, or common stock of their consanguinity, is the father: and as he had no inheritable blood in him, he can

Bract. l. 2, c. 7; Co. Litt. 244.

(*y*) 1 Prest. Est. 468.

(*z*) 2 Bl. Com. 249; Co. Litt. 8 a.

(*a*) Co. Litt. 2 b.

(*b*) Ib.; 1 Lev. 59.

(*c*) Co. Litt. 8 a.

communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And though this opinion of his was afterwards overruled (*d*), it was only on the ground that the descent from one brother to the other might be considered as *immediate*, and without regard to the *commune vinculum* (*e*).

[The subject, however, of tracing descent through an alien, subsequently to the time of Lord Coke became regulated by act of parliament. For it was enacted by the statute 11 Will. III. c. 6 (*f*), that all persons, natural-born subjects of the king, might inherit and make their title by descent from any of their ancestors, (lineal or collateral,) although their father or mother, or other ancestor, by, from, through, or under whom they derived their pedigrees, were born out of the king's allegiance.] And such is still the law as to tracing descent in regard to any estate which accrued before the 12th May, 1870,—the day on which passed the "Naturalization Act" of that year (33 & 34 Vict. c. 14). But by the second section of that statute it was provided, with regard to all titles accruing *after* that date, that real and personal property of every description may be taken, acquired, held and disposed of by an alien, in the same manner in all respects as by a natural-born British subject; and that a title thereto may be derived through, from, or in succession to an alien as if he had been such a subject (*g*).

Such is the state of the law with respect to escheats *propter defectum sanguinis*; as to which we shall only further observe, that by the Trustee Act, 1850 (13 & 14

(*d*) Collingwood *v.* Pace, 1 Vent. 415; 1 Lev. 59; 1 Sid. 193. See Kynnaird *v.* Leslie, Law Rep., 1 C. P. 389.

(*e*) As to this, vide sup. p. 418.

(*f*) See also 25 Geo. 2, c. 39, explanatory of this statute, as to which see Co. Lit. by Harg. 8 a, (n.).

33 & 34 Vict. c. 14, s. 2. But the Act confers no right on an alien to hold real property *out* of the United Kingdom; nor to hold any municipal, parliamentary or other office or franchise (ibid.), or to be the owner of a British ship (s. 14).

Vict. c. 60), another case is withdrawn from the operation of escheat,—viz., where the land was held by the party deceased, *under a trust or mortgage*,—it being provided by this statute (as it had been in substance by earlier enactments), for the protection of the party beneficially interested, that where a trustee or mortgagee dies intestate without an heir (or his heir or devisee is not known), the Court shall have power to make an order vesting the lands in such person and in such manner as the Court shall direct (*h*).

II. We now arrive at the consideration of escheats *propter delictum tenentis;* which was, where, by attainder, the blood of the person attainted became, in the eye of the law, so corrupted as to be no longer inheritable.

Attainder imports that extinction of civil rights and capacities which took place whenever a person who had committed treason or other felony received judgment of death or outlawry for his crime (*i*); and (besides other consequences) at one period of our law it involved in certain cases *the corruption of blood*, so as to prevent the descent of land (which depends, as we have seen, on blood or consanguinity) to the offender or his heirs.

The old law with respect to corruption of blood upon attainder, and the consequent escheat of the offender's lands and tenements to the lord of the fee, has been so much altered by the modern enactments to which we shall presently refer, as to have lost much of its former importance. As explanatory however of these, and as throwing light on the researches of the student, its doctrines continue to deserve our attention; and we shall here proceed to examine them (*k*).

According to the antient law, by the commission of treason, or other felony, the blood of the tenant was cor-

(*h*) 13 & 14 Vict. c. 60, ss. 14, 19; and see 44 & 45 Vict. c. 41, ss. 31—34.

(*i*) See further as to attainder, post, bk. VI. c. XXIII.

(*k*) See 2 Bl. Com. 252—256.

rupted and stained, and the original donation of the feud was thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit;* upon the thorough demonstration of which guilt by legal attainder, the feudal covenant and mutual bond of fealty were held to be broken, the estate instantly fell back from the offender to the lord of the fee, and the inheritable quality of his blood was extinguished and blotted out for ever.

This escheat to the *lord* by reason of his tenant's attainder, must be carefully distinguished from forfeiture to the *crown;* consequences which by reason of their similitude in some points, and because the crown being very frequently the immediate lord of the fee, was therefore entitled to both, have been often confounded together. For, independently of any escheat, the felon's lands and tenements (to the extent of his interest therein) were, by force of the attainder, immediately forfeited to the crown (*l*).

Escheat to the lord, therefore, operated in subordination to forfeiture to the crown; indeed, the law of forfeiture was (in the case of treason at least) of older date in this country than that of escheat; for the former doctrine prevailed in the old Saxon times (*m*), while the latter appears to have been the result of the introduction of the Norman tenures (*n*).

Hitherto we have only spoken of estates vested in the offender, at the time of his attainder. And here the law of forfeiture stopped; but the law of escheat pursued the matter still further. For the blood of the tenant being, on his attainder, utterly corrupted and extinguished, it followed, not only that all that he then had should escheat from him, but also that he should be incapable of inheriting anything for the future: and this may further illustrate the distinction between forfeiture and escheat.

(*l*) 1 Inst. 64 ; 1 Salk. 85.
(*m*) Wilkins' Leges Anglo-Sax. Ll. Alfred. c. 4 ; Ll. Canut. 54.
(*n*) 2 Bl. Com. 252.

If, therefore, a father was seised in fee, and the son committed treason and was attainted, and then the father died, here the land would escheat to the lord; because the son, by the corruption of his blood, was incapable to be heir, and there could be no other heir during his life; but nothing would be forfeited to the king, for the son never had any interest in the lands to forfeit (*o*). In this case the escheat operated, and not the forfeiture; but in the following instance the forfeiture worked and not the escheat. As where a new felony was created by act of parliament, and it was provided (as was frequently the case) that it should not extend to corruption of blood; here the lands of the felon would not escheat to the lord, but yet the profits of them would be forfeited to the king for a year and a day and so long after as the offender lived (*p*).

There was yet a further consequence of the corruption and extinction of hereditary blood, which was this, that the person attainted would not only be incapable himself of inheriting, or transmitting his own property by heirship; but would also obstruct the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, was not only exhausted for the present, but totally dammed up and rendered impervious for the future. This was a refinement upon the antient law of feuds; which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony (*q*). But, by the law of England, a man's blood was so universally corrupted by attainder, that his sons could neither inherit to him nor to any other ancestors, at least on the part of their attainted father (*r*).

This corruption of blood could not be absolutely removed but by authority of parliament. The king might excuse

(*o*) Co. Litt. 13 a.
(*p*) 3 Inst. 47.
(*q*) Van Leeuven, in 2 Feud. 31.
(*r*) Co. Litt. 391 b.

the public punishment of an offender; but could not abolish the private right, which had accrued, or might accrue, to individuals as a consequence of the criminal's attainder. He might remit a forfeiture, in which the interest of the crown is alone concerned; but he could not wipe away the corruption of blood; for therein a third person had an interest, namely, the lord who claimed by escheat. If, therefore, a man had a son, and was attainted, and afterwards pardoned by the king, this son could never inherit to his father, or his father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so; but if the son had been born after the pardon, he might inherit; because by the pardon the father was made a new man, and might convey new inheritable blood to his after-born children (*s*).

Upon the whole it appears, that a person attainted was neither allowed to retain his former estate, nor to inherit any future one; nor could he transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feudal property, was blotted out, corrupted, and extinguished for ever; and the consequence was that estates, thus impeded in their descent, resulted back and escheated to the lord.

But the doctrine of corruption of blood on attainder, arising as it did from feudal principles, and perhaps extending further than even those principles would warrant, gradually came to be regarded as a peculiar hardship, at least as regarded the family of the offender. And therefore in most (if not all) of the new felonies from time to time created by parliament since the reign of Henry the eighth, it was declared that they should not extend to any corruption of blood (*t*). And in our own

(*s*) Co. Litt. 392 a.

(*t*) By 7 Anne, c. 21, it was enacted, that after the death of the Pretender and his sons, no attainder for treason should operate to the prejudice of other than the offender

times the spirit of those enactments became infused into the general law of the realm; and whatever savoured of inhumanity or harshness under the antient system was effectually (though by degrees) removed. For by 54 Geo. III. c. 145, it was provided that no attainder for felony, except for *treason* or *murder*, should extend to the disinheriting of, nor to the prejudice of, any person other than the offender himself during his life. Again, by the Inheritance Act, (3 & 4 Will. IV. c. 106,) that when the person, from whom descent is to be traced, should have had any relation who having been attainted had died before such descent; such attainder should not prevent the descent from being traced through such relation, unless the estate had escheated on such attainder before 1st January, 1834 (*u*). Moreover, by the Trustee Act, 1850 (13 & 14 Vict. c. 60), it has been enacted that no lands, stock, or chose in action, vested in any person upon any *trust*, or by way of *mortgage*, should escheat by reason of the attainder or conviction of the trustee or mortgagee for any offence. And the doctrine of escheat *propter delictum tenentis*, gradually reduced in importance by these several enactments, seems now to have been altogether set aside; it having been provided by the 33 & 34 Vict. c. 23, s. 1, reciting it to be "expedient to abolish the forfeiture of lands and goods for treason and felony," that after the passing of that act no confession, verdict, inquest, conviction, or judgment for any treason or felony or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat (*x*).

In conclusion of the chapter we may remark, that where (under the former law) an escheat or forfeiture of lands

himself; but this provision (the operation of which was postponed by 17 Geo. 2, c. 39) was repealed by 39 Geo. 3, c. 93.

(*u*) 3 & 4 Will. 4, c. 106, s. 10.

(*x*) The Act, however, preserves *in statu quo* the law of forfeiture consequent on *outlawry* (33 & 34 Vict. c. 23, s. 1); and now, by the statute 42 & 43 Vict. c. 59, outlawry itself in all *civil* proceedings is abolished.

actually took place, its consequences were frequently remitted, when the crown was the party entitled to take the benefit. For, in such event, the sovereign, by modern acts of parliament, was frequently empowered to make grants for the purpose of restoring the land to the family of the former owner; or to carry into effect any grant, conveyance, or devise of the same that such owner might have intended to make

(*y*) See, for example, 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, c. 94; 6 Geo. 4, c. 17.

CHAPTER XIII.

OF TITLE BY OCCUPANCY.

[OCCUPANCY is the taking possession of those things which theretofore belonged to nobody. This, as we have seen, is the true ground and foundation of all property; that is, of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind (*a*). But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating anything to his own use, and in consequence of such intention actually took it into possession, should thereby gain the absolute property of it; according to the doctrine recognized by the laws of Rome, *quod nullius est, id* ratione naturali *occupanti conceditur* (*b*).

This right of occupancy, so far as it concerns real property (for of personal chattels we do not in this place speak), hath been confined by the laws of England within a very narrow compass and never extended beyond a single instance; namely, where a man was tenant *pur autre vie*, that is, had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie*, (or him by whose life it was holden): in this case, he that could first enter on the land might lawfully retain the possession so long as *cestui que vie* lived, by right of *common* occupancy (*c*).

(*a*) Vide sup. pp. 151 et seq.

(*b*) Ff. 41, 1, 3.

(*c*) Co. Litt. 41 b. As to title by occupancy, see Geary *v.* Bearcroft, Carter, 59; Vaughan, 187.

[This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though at one time it was supposed so to do (*d*); for he had parted with all his interest so long as *cestui que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it, much less of so minute a remnant as this; it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in the grant;] nor could it vest in his executors, for (at the period of which we speak) an estate *pur autre vie* seems not to have been devisable by will (*e*). Belonging therefore to nobody, like the *hæreditas jacens* of the Romans, the law left it open to be seized and appropriated, under the name of an occupant, by the first person that could enter upon it during the life of *cestui que vie* (*f*). But if the estate *pur autre vie* had been granted to a man *and his heirs* during the life of *cestui que vie*, there could not be a title by common occupancy, but the heir of the grantee would succeed, and was then called a *special* occupant (*g*). And so the law continues to this day,—the heir succeeding, according to the doctrine most commonly received, in virtue of a special exclusive right (by the terms of the original grant) to enter upon and occupy the land during the residue of the estate granted; for (it is argued) as his ancestor had no estate of inheritance, he cannot, properly speaking, take by descent. But by other authorities, the heir (though termed a special occupant) does in reality

(*d*) See Bract. l. 2, c. 9; l. 4, tr. 3, c. 9, s. 4; Flet. l. 3, c. 12, s. 6; l. 5, c. 5, s. 15.

(*e*) See 1 Powell on Devises, p. 34.

(*f*) 2 Bl. Com. p. 259.

(*g*) See Atkinson *v.* Baker, 4 T. R. 229, and the other authorities cited in Carpenter *v.* Dunsmure, 3 Ell. & Bl. 918. As to the case where an estate *pur autre vie* is granted to a man and "his executors, administrators and assigns," see Westfaling *v.* Westfaling, 3 Atk. 460; Williams *v.* Jekyl, 2 Ves. sen. 683; Ripley *v.* Waterworth, 7 Ves. 425; Fitzroy *v.* Howard, 3 Russ. 230.

take by descent; and his estate, though not a fee, is a descendible freehold (*h*).

An estate *pur autre vie* may be granted not only to a man and his heirs, but to a man and the heirs of his body; and this is termed a *quasi entail;* the interest so granted not being properly an estate tail,—for the statute *De donis* applies only where the subject of the entail is an estate of inheritance (*i*),—but yet so far in the nature of an estate tail, that it will go to the heir of the body of the grantee as special occupant, during the life of *cestui que vie*. And an estate *pur autre vie* so limited may be also granted with a remainder thereon during the life of *cestui que vie:* but the alienation of the *quasi* tenant in tail will bar not only his issue but those in remainder; and the alienation for that purpose (unlike that of an estate tail properly so called) may be effected by *any* method of conveyance *inter vivos* (*k*).

In order to remedy the inconvenience attaching to the previous law with regard to the occupancy of estates *pur autre vie*, during the interval between the death of the owner and that of *cestui que vie*, careful provisions have been made by the legislature in modern times. For by the Statute of Frauds, (29 Car. II. c. 3,) s. 12, and by 14 Geo. II. c. 20, s. 9, an estate *pur autre vie* was rendered devisable by will, and (in default of such disposition) was made liable, in the hands of the heir as special occupant, or of the personal representatives, as the case might be, to the debts of the deceased owner; and subject thereto, to distribution among the next of kin (*l*). And

(*h*) See Holden *v.* Smallbroke, Vaughan, 201; Doe *v.* Martin, 2 W. Bl. 1150; Doe *d.* Blake *v.* Luxton, 6 T. R. 291; Bearpark *v.* Hutchinson, 7 Bing. 188.

(*i*) Co. Litt. by Harg. 20 a, n. (5).

(*k*) See 3 P. Wms. 265, n. (5th ed.); Norton *v.* Frecker, 1 Atk. 524; Grey *v.* Mannock, 2 Eden, 339: Doe *v.* Luxton, ubi sup.; Campbell *v.* Sands, 1 Sch. & Lef. 294; Dillon *v.* Dillon, 2 Ball & B. 77; Hopkins *v.* Ramadge, 1 Batty, 365.

(*l*) See Doe *d.* Jeff *v.* Robinson, 8 Barn. & Cress. 296; Doe *d.* Lewis *v.* Lewis, 9 Mee. & W. 662; see also Co. Litt. by Harg. 41 b, n. (*s*).

though these provisions were repealed by the New Wills Act (7 Will. IV. & 1 Vict. c. 26), fresh enactments were made in that statute, in terms somewhat more extensive, to the following effect (*m*);—that an estate *pur autre vie*, of whatever tenure, and whether it be a corporeal or incorporeal hereditament, may be devised by last will and testament (*n*): that if no disposition by will be made of an estate *pur autre vie* of a freehold nature, it shall be chargeable in the hands of the heir (if it comes to him by reason of special occupancy) as assets by descent, as in the case of freehold land in fee simple (*o*): that in case there shall be no special occupant of an estate *pur autre vie*, of whatever tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant: and that, in every case where it comes to the hands of such personal representative, whether by special occupancy or in virtue of that Act, it shall be assets in his hands, to be applied and distributed in the same manner as personal estate (*p*).

It is only in an estate *pur autre vie* (as already remarked), that our law affords any example of the acquisition of land by occupancy. It is difficult at least to put any other instance wherein there is not some owner of the land appointed by the law (*q*). [In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal*, *potential* ownership subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And in

(*m*) The repeal does not extend to the estates of persons dying prior to 1st January, 1838 (7 Will. 4 & 1 Vict. c. 26, ss. 2, 34).

(*n*) 7 Will. 4 & 1 Vict. c. 26, s. 3. The earlier statutes did not apply to copyholds, Zouch *v.* Forse, 7 East, 186.

(*o*) Sect. 6. As to assets, vide sup. p. 432.

(*p*) Sect. 6.

(*q*) 2 Bl. Com. p. 261.

[all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descent, there the law vests an ownership in the crown, or in the subordinate lord of the fee, by escheat.]

So also, where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner (*r*). Thus, in case a new island rise in the *sea*, though the civil law gives it to the first occupant (*s*), yet ours gives it to the sovereign (*t*). And as to lands gained from the sea, either by *alluvion*, that is, the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land immediately behind, for *de minimis non curat lex.* But if the alluvion or dereliction be sudden and considerable, in this case it belongs *de jure communi* to the crown; for the soil, when the sea flowed over it, was *primâ facie* the crown's property (*u*), and therefore ought to remain so, though no longer covered by the sea (*x*). And upon the same principle, a sudden inundation from

(*r*) 2 Bl. Com. p. 261.

(*s*) Inst. 2, 1, 22.

(*t*) Hale, *de Jure Maris*, p. 17; Callis of Sewers, p. 45. The treatise, *de Jure Maris*, was published by Mr. Hargrave, and has been generally received as a work of Lord Hale; but doubt is thrown on this point in a learned argument of Mr. Serjeant Merewether, in Attorney-General *v.* Mayor, &c. of London, before the Court of Chancery.

(*u*) Hale, ubi sup. p. 14; see Blundell *v.* Catterall, 5 B. & Ald. 268.

(*x*) 2 Bl. Com. 262; Hale, ubi sup.; 2 Roll. Abr. 170; Dyer, 326; Callis, pp. 51, 53; and see Rex *v.* Lord Harborough, 3 Barn. & Cress. 91; 5 Bing. 163; Scratton *v.* Brown, 4 Barn. & Cress. 505. It is to be observed, however, that in Hale, ubi sup. (pp. 12, 17), it is laid down that the king may grant a manor *cum littore maris* to a subject, and that the shore (that is, the space between the ordinary high and low-water mark) will pass thereby; and it would seem, that after such a grant, a sudden increase of land by alluvion or dereliction, within these limits, would belong to the grantee.

the sea will not deprive the former owner of the land submerged, of his previous property therein (*y*); though, on the other hand, it has been decided, that where the sea gains upon the land by gradual advance, (the crown being the owner between high and low water-mark,) the crown becomes also the owner of the land newly covered with water (*z*). [It is said, too, by Bracton, that if an island rise in the middle of a *river*, it belongs to those who have lands on each side thereof, in common; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore (*a*). Yet this seems only to be reasonable where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man,—as it usually is whenever a several fishery is claimed (*b*),—there it seems just (and so is the constant practice) that the eyots or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. It is further laid down in our books, that if a river running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, his land will not be lost (*c*). And this law of alluvions and derelictions, with regard to rivers, is nearly the same in the imperial law, from whence indeed those our determinations seem to have been drawn and adopted; but we ourselves, as islanders, have applied them to *marine* increases (*d*).]

(*y*) Hale, *de Jure*, &c., pp. 15, 17.

(*z*) In re Hull and Selby Railway, 5 Mee. & W. 327.

(*a*) Bract. lib. 2, c. 2.

(*b*) Smith *v.* Kemp, Salk. 637.

(*c*) Callis, p. 51. In Blackstone (vol. ii. p. 262) the statement on this subject is, that he "shall have "what the river has left in any "other place;" but this seems not to be supported by the authorities.

(*d*) 2 Inst. 1, 20, 21, 22, 23, 24.

CHAPTER XIV.

OF TITLE BY FORFEITURE.

FORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they go to the party injured as a recompense for the wrong which either he alone, or the public together with himself, hath sustained (*a*).

Lands may be forfeited by various means; some of which it will not be convenient to discuss in this place, as they are incidental only to subjects of a more general description, belonging to other divisions of the work (*b*). But there are three kinds of forfeiture which require a distinct and separate consideration, and to which the present chapter will consequently be devoted. The first of them accrues by alienation in mortmain; the second, by the wrongful alienation of particular tenants; the third, by wrongful disclaimer.

1. [Alienation in *mortmain*, *in mortuâ manu*, is an alienation of lands or tenements to any corporation,—sole or aggregate, ecclesiastical or temporal (*c*). But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one "dead hand," this hath occasioned the general appellation of mortmain to be applied to such alienations; and the religious houses themselves to be principally con-

(*a*) 2 Bl. Com. p. 267.

(*b*) As to forfeiture of lands *by attainder* under the law as it existed prior to the passing of the 33 & 34 Vict. c. 23, vide post, bk. VI. c. XXIII.

(*c*) Co. Litt. 2 b. As to corporations, vide sup. pp. 362, 375, post, bk. IV. pt. III.

[sidered in forming the statutes of mortmain. And in deducing the history of these statutes, it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments pursued them through all their finesses; how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, obtained a decisive victory.]

By the common law, a corporation is as capable of purchasing lands as an individual (*d*);—subject to this distinction, that persons corporate take the fee to hold to their *successors*, instead of their *heirs*. Yet it has always been necessary for corporations to have a licence in mortmain from the crown, to enable them to become the holders of lands (*e*); for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants who can never die. [And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest (*f*). But besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also (upon the same feudal principles), for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the lands so aliened in mortmain, as for a forfeiture.] Yet such were the influence and ingenuity of the clergy, that, notwithstanding this fundamental principle, we find that the

(*d*) Case of Sutton's Hospital, 10 Rep. 30; Co. Litt. 2 b.

(*e*) F. N. B. 221.

(*f*) Selden, Jan. Angl. l. 2, s. 45. It should be observed, however, that a doubt is expressed by a writer of great authority, whether before Magna Charta, any restraint was put by the common law upon alienations in mortmain; see Hallam's Middle Ages, vol. ii. p. 321, 7th edit.

largest and most considerable dotations of religious houses without licence, happened within less than two centuries after the Conquest. [But when these began to grow numerous it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; and that the lords were curtailed of the fruits of their seigniories,—their escheats, wardships, reliefs, and the like. And therefore, in order to prevent this (*g*), it was ordered by the second of king Henry the third's great charters (*h*), and afterwards by that printed in our common statute books, that all such gifts should be void, and the land forfeited to the lord of the fee (*i*).

But as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies—who, Sir Edward Coke observes (*j*), in this were to be commended, that they ever had of their council the best learned men that they could get—found many means to creep out of this statute, by buying in lands that were holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which became so frequent in conveyances. This produced the statute *De religiosis*,

Blackstone (vol. ii. p. 269) enumerates, as another of the mischiefs, the prevention of which was designed, "that the circulation of "landed property from man to man "began to stagnate." Lord Coke, however, in 2 Inst. 75, lays it down (in conformity with the language of the statute *De religiosis*), that the causes of the law were two, viz., that the services for defence of the realm were withdrawn, and that the lords lost their escheats and the like; (and see Co. Litt. 2 b.) Though the holding of lands in mortmain naturally tended to restrain alienation, this does not appear to have formed one of the reasons on which the policy of the law of mortmain was originally founded.

(*h*) A.D. 1217, c. 43, edit. Oxon.

(*i*) Mag. Chart. (25 Edw. I.) It is laid down by Lord Coke that the prohibition extended as well to the case where the religious house *kept* the land so conveyed, as where they *gave it back* to hold of themselves; (2 Inst. 74.)

(*j*) 2 Inst. 75.

[7 Edw. I.;—which provided, that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift, or lease, or any other title whatsoever; nor should by any art or ingenuity appropriate to himself; any lands or tenements in mortmain: upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land which it was intended they should have, and to bring an action to recover it against the tenant, who by fraud and collusion made no defence; and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right which afterwards became the great assurances of the kingdom, under the name of *common recoveries* (*k*). But, upon this, the statute of Westminster the Second (13 Edw. I. c. 32) enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land; and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter (cap. 33), in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions,

(*k*) Vide sup. p. 248; post, bk. II. pt. I. c. XIX.; Hist. Eng. Law, by Reeves, vol. ii. p. 155.

[that when the statute of *Quia emptores* (18 Edw. I. c. 3) abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, he caused a proviso to be inserted that this should not extend to authorize any kind of alienation in mortmain (*l*). And when afterwards the method of obtaining the king's licence by writ of *ad quod dammum* was recognized by 27 Edw. I. (stat. 2), it was further provided by 34 Edw. I. (stat. 3) that no such licence should be effectual without the consent of the mesne or intermediate lords (*m*).

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* these religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of "uses and trusts," the foundation of modern conveyancing (*n*). But unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Rich. II. c. 5, enacted, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large

(*l*) 2 Inst. 501.

(*m*) In the Revised Edition of the Statutes, 34 Edw. I. st. 3, is printed 20 Edw. I. As to the nature of the writ *ad quod damnum*, see Hist. Eng. Law, by Reeves, vol. ii. p. 230.

(*n*) Vide sup. p. 360.

[tracts of land adjoining to churches, and consecrating them by the name of churchyards, such subtle imagination was also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, were also declared to be within the mischief, and of course within the remedy provided.]

The policy of these statutes prohibitory of alienation in mortmain, was afterwards considered as fit to be extended also to the case where lands, though not conveyed to corporate bodies, were given *on trust* for parish churches or other institutions, "erected and made of devotion;"—for the trustees to carry such uses into effect being generally numerous, and the land belonging, on the decease of each trustee, to the survivors, these gifts operated like gifts in mortmain, properly so called, to the diminution of descents with their attendant feudal perquisites, and, for the same reason, to the diminution of escheats (*o*). It was consequently declared by the statute 23 Henry VIII. c. 10, that all future grants of lands in trust for any of the purposes aforesaid, if for any longer term than twenty years, should be void.

[As to the prohibition, however, to aliene to bodies corporate, it is to be observed, that, during all this time it was in the power of the crown, by granting a *licence of mortmain*, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed

(*o*) See the preamble of 23 Hen. 8, c. 10, and the argument in Porter's case. (1 Rep. 23 b.) The protection of the feudal rights, however, was probably not the only object. "As the age became "enlightened" (remarks an useful writer), "gifts of this kind "were viewed with a less favour-"able eye. These sentiments, "concurring with the designs of "the enterprising prince upon the "throne, contributed towards the "general attack which was soon "afterwards made on one branch "of such institutions" (those erected for devotion), "the re-"ligious houses."—Hist. Eng. Law, by Reeves, vol. iv. p. 237.

[by the statute 18 Edw. III. stat. 3, c. 3. But as doubts were conceived at the time of the Revolution how far such licence was valid (*p*)—since the king had no power to dispense with the statutes of mortmain by a clause of *non obstante*, which was the usual course, though it seems to have been unnecessary (*q*), and as, by the gradual declension of mesne seigniories through the long operation of the statute of *Quia emptores*, the rights of immediate lords were reduced to a very small compass,—it was therefore declared by the statute 7 & 8 Will. III. c. 37, that the crown for the future, at its own discretion, might grant licences to aliene or take in mortmain, of whomsoever the tenements might be holden (*r*).

Nor was this the only relaxation that, in comparatively early times, took place in the law of mortmain; for after the dissolution of monasteries under Henry the eighth, though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years, by the statute 1 & 2 Ph. & M. c. 8; and during that time any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever.] And long afterwards, under the influence of much more commendable views, it was enacted by 17 Car. II. c. 3 (*s*), and by many subsequent Acts—among which may be particularized 2 & 3 Anne, c. 20 (*t*), 43 Geo. III. c. 108,

(*p*) See 2 Hawk. P.C. 391; Co. Litt. by Harg. 99 a, n. (1); stat. 1 W. & M. sess. 2, c. 2.

(*q*) Co. Litt. 99 a.

(*r*) Since this statute the writ of *ad quod damnum*, in order to obtain a licence of mortmain, seems no longer necessary.—See Coleridge's Blackstone, vol. ii. p. 273, n. (2); and Co. Litt. ubi sup.

(*s*) By 1 & 2 Vict. c. 106, s. 15, the statute of 17 Car. 2, c. 3, was repealed; but it was revived, so far as this subject is concerned, by 6 & 7 Vict. c. 37, s. 25.

(*t*) By this Act, and the subsequent statutes passed for its amendment, the fund usually called *Queen Anne's Bounty* is regulated.

55 Geo. III. c. 147, 3 & 4 Vict. c. 60, 6 & 7 Vict. c. 37, s. 22, 17 & 18 Vict. c. 84, and 19 & 20 Vict. c. 104, s. 23—that augmentations of *poor livings* may be made free from the restrictions of the statutes of mortmain; and under other modern statutes grants of land are now permitted to be freely made to corporate bodies, for several purposes, and particularly for such as are connected with the *education of the poor*, and with *charities* in general (*u*).

In another direction, however, the law of mortmain as it existed in the time of Henry VIII. was afterwards made more stringent. It was held that the statute 23 Henry VIII. before mentioned did not extend to any thing but *superstitious* uses (*x*): and that therefore a man might give lands notwithstanding that statute, on trust for the maintenance of a school, or the sustenance of poor people, or any other *charitable* use (*y*). But as it was apprehended "from recent experience," that persons on their death-beds might make "large and improvident" dispositions even for these good purposes, to the disherison of their lawful heirs (*z*); it was therefore enacted by the "Mortmain Act," 9 Geo. II. c. 36 (*a*), that no

(*u*) Among recent enactments in relaxation of the law of mortmain are 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 16 & 17 Vict. c. 137, s. 27; 17 & 18 Vict. c. 112; 18 & 19 Vict. c. 124, ss. 35, 41, and 31 & 32 Vict. c. 44,—as to sites for buildings for *religious, educational, literary, scientific* and other charitable purposes; 22 Vict. c. 27, ss. 1, 2, and 34 & 35 Vict. c. 13, as to *recreation grounds, public parks*, &c.; 23 & 24 Vict. c. 134, s. 3, as to certain *Roman Catholic charities*. There is also a provision in the 25 & 26 Vict. c. 61, s. 9, enabling *highway boards* to take lands without licence. Also the 25 & 26 Vict. c. 89, ss. 18, 21, enables *registered companies* to hold land, to a certain extent, without licence. And by the 33 & 34 Vict. c. 34, trust funds held for *public* and *charitable purposes* are permitted to be invested in real securities, without the trustees being deemed thereby to have acquired land within the meaning of the mortmain laws.

(*x*) Porter's case, 1 Rep. 24. See also Adams & Lambert's case, 4 Rep. 104; Da Costa *v.* De Pas, Ambl. 228.

(*y*) As to charitable uses, see also 43 Eliz. c. 4; 52 Geo. 3, c. 101; Bac. Abr. Char. Us.

(*z*) 2 Bl. Com. 273.

(*a*) As to the construction of this Act, see Att.-Gen. *v.* Stewart,

lands or hereditaments, or money to be laid out in the purchase thereof, shall be given or conveyed, or anyways charged or incumbered, in trust for, or for the benefit of, any *charitable* use whatsoever, unless by deed (*b*), executed in the presence of two witnesses twelve calendar months before the death of the donor (*c*), and enrolled in Chancery, within six calendar months after its execution (*d*),—and unless such gift be made to take effect immediately (*e*), and be without power of revocation, or other clause or covenant for the benefit of the donor, or those claiming under him. And if these several conditions are not complied with, not only is the charitable use inoperative, but the conveyance itself is void to all intents and purposes (*f*). But by 24 & 25 Vict. c. 9 (amended by 25 & 26 Vict. c. 17), the restriction in the Mortmain Act as to clauses for the benefit of the donor is so far qualified that there may now be, in any deed or assurance for charitable uses made after the 17th May, 1861, a clause or covenant in his favour,—provided it shall consist of a grant or reservation of a *nominal* rent, or of mines, minerals or easements: or shall consist of provisions as to buildings, roads, and the like, for the better enjoyment as well of the property granted as of adjacent property; or of provisions as to re-entry, on

2 Meriv. 161; Doe *v.* Lloyd, 5 Bing. N. C. 741; Jefferies *v.* Alexander, 8 House of Lords Cases, p. 594; Entwisle *v.* Davis, Law Rep., 4 Eq. Ca. 272; Hawkins *v.* Allen, ib., 10 Eq. Ca. 246; Luckraft *v.* Pridham, ib., 6 Ch. D. 214.

(*b*) Under the Mortmain Act, such deed was required also to be *indented*, but by 24 & 25 Vict. c. 9, s. 1, it need now neither be indented nor purport to be indented: and in the case of assurances of land of copyhold and customary tenure, no deed is required.

(*c*) See Wickham *v.* Marquis of Bath, Law Rep., 1 Eq. Ca. 17.

(*d*) However, by 29 & 30 Vict. c. 57, deeds otherwise valid, but not hitherto enrolled, may be authorized to be enrolled, on the Court being satisfied that the deed was made *bonâ fide* for full and valuable consideration, and that the omission to enrol arose from mere ignorance, inadvertence or accident.

(*e*) See Wickham *v.* Marquis of Bath, ubi sup. A demise will be deemed to take effect *immediately*, if it take effect within a year from its date. (26 & 27 Vict. c. 106.)

(*f*) Doe *v.* Wrighte, 2 Barn. & Ald. 710.

breach of such covenant, or other stipulation of the like nature. The donor, however, in all such cases, must reserve for his representatives the same benefits as for himself, if he would prevent the operation of the statute.

It will be observed that the Mortmain Act altogether prevents any disposition *by will*, of lands (or of money to be laid out in land) in trust for any charitable use (*g*). On the other hand, its provisions are made subject to partial exception in the case of *stock in the public funds;* as to which, instead of a deed executed *twelve* months before the donor's death, it is required that the transfer in the bank books should be made *six* months at least before his death (*h*). There is also an exception where the transaction is a *bonâ fide* purchase, a full valuable consideration being paid down, or reserved by way of annual payment (*i*): and such purchases will (by more recent Acts) be valid, notwithstanding the death of the vendor within twelve months after the execution of the deed; and also though a *substantial* and not a nominal rent be reserved to the vendor as consideration for the assurance (*j*). Gifts to the Universities of Oxford and Cambridge, or any of their colleges, or in trust for the scholars on the foundations of Eton, Winchester and Westminster (*k*),—or in favour of the British Museum (*l*),—are also entirely exempted from the operation of the Mortmain Acts.

2. Alienations by *particular tenants*, when they conveyed by a common law conveyance, such as feoffment, fine, or recovery, a greater estate than the law entitled them to make, were, at common law (as already noticed), forfeitures to the person in immediate remainder or reversion (*m*). As if tenant for his own life aliened by feoffment

See Brook *v.* Badley, Law Rep., 4 Eq. Ca. 106; 3 Ch. App. 672; In re Watmough's Trusts, ib., 8 Eq. Ca. 272.

(*h*) 9 Geo. 2, c. 36, s. 1.

(*i*) Ibid.

(*j*) See 9 Geo. 4, c. 85; 27 & 28 Vict. c. 13, s. 4.

(*k*) 9 Geo. 2, c. 36, s. 4.

(*l*) 5 Geo. 4, c. 39.

(*m*) Vide sup. pp. 316, 324. According to Blackstone, (vol. ii.

for the life of another, or in tail or in fee;—these being estates which either must or might last longer than his own, the creating them was not only beyond his power, and inconsistent with the nature of his interest, but was also a forfeiture of his own particular estate, to him in remainder or reversion, who was entitled to enter immediately (*n*). For which the reason seems to be, that the tenant, by thus taking upon himself to assert a more extensive right than he derived from the lord of the fee, violated the feudal compact (which bound him to fidelity), and consequently no longer deserved to retain its benefit (*o*). He had therefore, by his own act, determined his own original interest; and, on such determination, the next taker was entitled to enter regularly, as in his remainder or reversion (*p*). The same law which is thus laid down with regard to tenants for life, held also with respect to lessees and other tenants of mere chattel interest; but if a tenant in tail aliened in fee, this was no immediate forfeiture to the remainder-man, but a mere *discontinuance*, as it was called, of the estate tail (*q*), which the issue might afterwards avoid by one of the class of actions called *real;* or, after the abolition of real actions, simply by entry (*r*): the reason assigned being that he in

p. 274,) "the forfeiture accrues "when the alienations are greater "than the law entitles them to "make, and *divest the remainder* "*or reversion*," which is also the expression of Lord Coke. (Co Litt. 251 a.) But where the reversion or remainder is in the crown, it is not divested, and yet a forfeiture equally accrued. (Co. Litt. 251 b.) So the levying of a fine in fee, by the particular tenant, of a thing lying in grant, used to work a forfeiture; and yet it did not divest the remainder or reversion; (ibid. And see Podger's case, 9 Rep. 106 b.)

(*n*) Blackstone (vol. ii. p. 274) cites Litt. s. 415.

(*o*) Vide sup. pp. 179, 280; et Gilb. Ten. 38, 39, where, after observing that if the vassal renounced the feud this was always a cause of forfeiture by the old feudal law, the learned author proceeds to remark, that "if the tenant for life makes "a feoffment, or levies a fine, it "is palpably contrary to his oath "of fidelity to the reversioner, and "therefore that is a plain renun-"ciation of the feud."

(*p*) See Bl. Com. ubi sup.

(*q*) Co. Litt. 328 a; 2 Inst. 335; Co. Litt. by Butler, 333 a, n. (1).

(*r*) A *discontinuance* formerly took

remainder or reversion has only a very remote and barely possible interest therein, until the issue in tail is extinct (*s*). This kind of forfeiture, viz. that which accrues by the illegal alienation of the particular tenant, differs materially, it is to be observed, from forfeiture by breach of condition in deed, to which we had occasion to refer in a former chapter, in this respect—that the reversioner is, in that case, *in* as of his former seisin; and consequently not only the estate of the tenant himself, but all interest derived out of it (even though derived before the forfeiture) are defeated (*t*): but in case of forfeitures by wrongful alienation, all rightful estates previously created, and all charges lawfully made on the land, are good and available in law. Thus if tenant for twenty years granted a lease for fifteen, and then aliened by feoffment in fee, thereby forfeiting his own estate, yet the lease he had granted would be good. The whole subject, however, of forfeiture by alienation has now lost much of its former importance, in consequence of changes in the state of the law relative to the chief conveyances by which this doctrine of the common law was brought into operation; viz. the abolition of fines and recoveries by 3 & 4 Will. IV. c. 74, and the provision of 8 & 9 Vict. c. 106, s. 4, formerly noticed, "that a feoffment made after 1st of October, 1845, shall "not have any tortious operation" (*u*).

3. [Analogous both in its nature and its consequences, to an illegal alienation by the particular tenant, is his *disclaimer:* as where a tenant neglects to render his lord the due services, and, upon an action brought to recover

away the right of entry, and put the issue, and those in reversion and remainder, to the necessity of bringing a real action." (Litt. ss. 595, 596, 597; Doe *v.* Finch, 1 Nev. & M. 130.) But now by the 39th sect. of the 3 & 4 Will. 4, c. 27, (abolishing most of the real actions,) it was enacted that no discontinuance shall take away any right of entry.

(*s*) 2 Bl. Com. p. 275.

(*t*) Gilb. Ten. 200; Dy. 344 a; 4 Rep. 24 a; Co. Litt. 234 a; 1 Roll. Ab. 474; vide sup. p. 299.

(*u*) Vide sup. p. 316.

[them, disclaims to hold of his lord. Which disclaimer of tenure, in any court of record, is a forfeiture of the lands upon reasons most apparently feudal (*x*).] And so, likewise, if the particular tenant does any act which amounts to a *virtual* disclaimer,—as if, being tenant for life only, he claims, in any court of record, to have in the estate a larger interest (*y*). And in a case, where tenant for years gave up possession of the premises demised to a third party who claimed paramount to the landlord, with intent to assist that party in setting up the adverse title—such behaviour was held a virtual disclaimer, and to work a forfeiture of his lease (*z*).

(*x*) Finch, 270, 271.
(*y*) Co. Litt. 251 b.
(*z*) Doe *d.* Ellerbrook *v.* Flynn, 4 Tyrw. 619. And see Doe *d.* Graves *v.* Wells, 10 Ad. & El. 427.

CHAPTER XV.

OF TITLE BY ALIENATION.

THE most usual title to real estates is that of *alienation* or conveyance: under which may be comprised any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

The acquisition of an estate by way of alienation is of more recent origin in the law of England, than taking property by way of descent. [For we may remember that, by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another, without the consent of the lord: lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend (*a*). And as the feudatory could not aliene it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir (*b*). And therefore it was usual in very antient feoffments, to express that the alienation was made by consent of the heirs of the feoffor: or sometimes for the heir apparent

(*a*) Vide sup. p. 179. (*b*) Co. Litt. 94; Wright, Ten. 169.

[himself to join with the feoffor in the grant (*c*). And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his seigniory without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due; and be able to distinguish a lawful distress for rent, from a hostile seizing of his cattle by the lord of a neighbouring clan (*d*). This consent of the vassal was expressed by what was called *attorning*, or professing to become the tenant of the new lord: and the doctrine of attornment was afterwards extended to all lessees for life or years; between whom and the lessor there still exists (as we have seen) the feudal relation of lord and tenant (*e*). Accordingly, if one bought an estate with any lease for life or years standing out thereon, and the lessee refused to attorn to the purchaser, the grant or contract was in most cases void, or at least incomplete; and this was also an additional clog upon alienations (*f*).

Madox, Formul. Angl. Nos. 316, 319, 427.

(*d*) Gilb. Ten. 83.

(*e*) Vide sup. pp. 256, 294. It is to be observed, however, that the attornment of the particular tenant was also necessary upon the grant of a *remainder*, as a *reversion*; and yet there is no feudal relation between the particular tenant and the remainder-man. The reasons assigned for attornment in this case were, 1st, that the remainder-man came in by the feudal feoffment, and therefore the remainder would not pass without the utmost notoriety; and this was by attornment *coram paribus*, to which such notoriety was attributed, that the feudal feoffment could not be altered without it; 2nd, because the action of waste, and the right of forfeiture of tenant for life, accrued to him in remainder; and therefore, the tenant for life being to some purposes attendant on the remainder-man, it was fit that he should attorn to his grant.—Gilb. Ten. 90, 91.

(*f*) Litt. § 551. In such cases, however, the lessee might be compelled to attorn, by the landlord's levying a fine; and no attornment was necessary where the estate vested under the Statutes of Uses or of Wills. (See Brown *v.* Storey, 1 Man. & Gr. in notis, p. 129.)

[But by degrees this feudal severity wore off; and experience showed that property best answered the purposes of civil life, especially in commercial countries, when its transfer and circulation were totally free and unrestrained. The road was cleared, in the first place, by a law of King Henry the first, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power, than over what had been transmitted to him in a course of descent from his ancestors (*g*); a doctrine which is countenanced by the feudal constitutions themselves (*h*): yet he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate (*i*). Afterwards, a man seems to have been at liberty to part with all his own acquisitions, provided he had previously purchased to him and his *assigns* by name (*k*); and he was also then allowed to part with one-fourth of the inheritance of his ancestors, without the consent of his heir (*l*): but by the great charter of Henry the third, no alienation was permitted of any part of the land, unless sufficient was left to answer the services due to the superior lord (*m*); which sufficiency was probably interpreted to be one-half or a moiety of the land (*n*). But these restrictions were, in general, removed by the statute of *Quia emptores* (18 Edw. I.); whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion (*o*): subject

"*Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.*"—Wilkins, Leg. Ang.-Sax., LL. Hen. 1, c. 70.

(*h*) Feud. l. 2, t. 39.

(*i*) "*Si questum tantum habuerit is, qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum hæredem exhæredare.*"—Glanv. l. 7, c. 1.

(*k*) Mirr. c. 1, s. 3. This is also borrowed from the feudal law. (Feud. l. 2, t. 48.)

(*l*) Mirr. ubi sup.

(*m*) 9 Hen. 3, c. 32.

(*n*) Dalrymple, of Feuds, 95; 2 Bl. Com. p. 161.

(*o*) Vide sup. p. 199.

[only to the provision that all conveyances of the fee should be to hold of the chief lord, and not of the grantor. And even these tenants *in capite* were by the statute 1 Edw. III. st. 2, c. 12, permitted to aliene on paying a fine to the king (*p*). Again, by the temporary statutes 7 Hen. VII. c. 2, and 3 Hen. VIII. c. 4, all persons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feudal burdens. And, lastly, fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24.] The restraints upon *devising* lands by will, (except in some cases by particular custom,) after being partially taken off by the Statute of Wills (32 Hen. VIII. c. 1), were at length totally removed, on the abolition of military tenures by the statute of Charles the second just mentioned. The doctrine of *attornment* continued later than any of the rest, and became extremely troublesome, though many methods were invented to evade it (*q*): till at last, by statute 4 & 5 Anne, c. 3, s. 9, it was made no longer necessary to complete any grant or conveyance; while, on the other hand, by 11 Geo. II. c. 19, s. 11, the fraudulent attornment of a tenant to a stranger, claiming title, to the prejudice of his landlord's possession, was rendered wholly inoperative (*r*).

The result of these several relaxations has at length been the complete disengagement of the realty from all the feudal restraints on alienation;—so that it may be laid down as a general maxim, subject to very few exceptions, that all estates in land are now freely transferable, unless granted under express stipulation to the contrary.

(*p*) 2 Inst. 67.

(*q*) 2 Bl. Com. 290.

(*r*) It is said that the term "attornment" is now, since the above statutes, chiefly applied (somewhat inaccurately) to such an acknowledgment of tenancy as operates by way of estoppel (see Brown *v.* Storey, 1 Man. & Gr. in notis, p. 129). But a legal attornment may still be required,—as where the new landlord claims rent not under a grant or conveyance, but as tenant by elegit, or otherwise, under a judgment. (See Harris *v.* Booker, 4 Bing. 99.)

And even such stipulations are in some instances inefficacious to the end designed; and are disregarded as repugnant in their nature, or contrary to the policy of the law. Thus if an estate be conveyed in fee simple, with a condition prohibiting the grantee and his heirs, or the grantee himself, from all alienation thereof, the condition is merely void (*s*); and a similar proviso annexed to an estate tail, will not prevent the tenant from making a valid conveyance in fee simple, in such method as the law has prescribed for that purpose (*t*). Estates at will or at sufferance, however, are, for reasons obviously resulting from their nature and constitution, not assignable. And besides these, there were, at the common law, some other interests which, generally speaking, were incapable of transfer. For a man who had been ousted of the possession of his land by the wrongful act of a stranger, so as to retain a *right of entry* only, could not in general convey that right to another; lest pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed (*u*): and the same law was

(*s*) Co. Litt. 222 b, 223 a.

(*t*) Ib. 223 b; Mary Portington's case, 10 Rep. 35. Such a condition, however, if annexed to a lease for years, is binding. (Co. Litt. 223 b; Roe *v.* Galliers, 2 T. R. 133.) The reason assigned by Coke for the invalidity of a condition restraining a tenant in fee simple or fee tail from any alienation whatever, is the repugnancy of such a restriction to the nature of the gift. A condition, however, restraining him and his *heirs* from alienation, is also opposed to that policy of the law which will not suffer any attempt to create a *perpetuity*, that is, to confine property in a given course of devolution *in perpetuum*; —a subject on which we shall have occasion to say more hereafter. It is to conditions restraining tenants in tail from alienation, that the term "perpetuity" seems to have been first applied.—(See Third Real Property Report, p. 30.) As to the validity or invalidity of provisions restrictive of alienation in other cases,—a subject which would lead to too lengthy a discussion in this place,—the following cases may be consulted:—Roe *v.* Galliers, ubi sup.; Ware *v.* Cann, 10 Barn. & Cress. 433; Brandon *v.* Robinson, 18 Ves. 433; Jackson *v.* Hobhouse, 2 Mer. 483; Scarborough *v.* Borman, 1 Beav. 34; Allen *v.* Jackson, 1 Ch. D. 399. See also 19 & 20 Vict. c. 120, s. 37.

(*u*) 2 Bl. Com. 290.

established with respect to a *contingent* interest (*x*); as to which, however, this further doctrine obtained, that though not generally transferable at law, yet the assignment of it for a valuable consideration was considered effectual in equity (*y*). But by 7 Will. IV. & 1 Vict. c. 26, s. 3, both a right of entry and a contingent interest were made capable of passing by way of *devise*. And by 8 & 9 Vict. c. 106, these classes of interests may now also pass *by deed*;—it being provided that after the 1st October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained;—and also a right of entry, whether immediate or future, and whether vested or contingent, in or upon any tenements or hereditaments in England, of any tenure,—may be disposed of by deed; with a saving, however, as to the regular modes of alienation of the interests of tenants in tail and married women,—which are still to be observed (*z*).

Having made these remarks on the subject of alienation in general, we shall now proceed to inquire, first, *who* may aliene, and to *whom*: and, secondly, *how* a man may aliene; that is to say, to discuss the several modes of conveyance.

I. Who may aliene, and to whom: or, in other words, who is capable of conveying and who of purchasing; the latter term being of course here used, not in its popular but in its technical sense (*a*). And herein we must con-

(*x*) See Forrester *v.* Goodright, 8 East, 552; Doe *v.* Tomkinson, 2 M. & Sel. 170. As to the binding of a contingent interest by *estoppel*, see Goodtitle *v.* Morse, 3 T. R. 371; Doe *v.* Martin, 5 Barn. & Cress. 527; Christmas *v.* Oliver, 10 Barn. & Cress. 181; Right *v.* Bucknell, 2 Barn. & Adol. 278.

(*y*) 1 Prest. Est. 89; 1 Fonb. Tr. Eq. 213, 214.

(*z*) 8 & 9 Vict. c. 106, s. 6. As to this section, see Hunt *v.* Remnant, 9 Exch. 635.

(*a*) Vide sup. p. 386.

sider rather the incapacity than capacity of the several parties; for all persons are *primâ facie* capable both of conveying and of purchasing, unless the law has laid them under any particular disabilities.

It is clear that at one period of our law *attainted* persons, though they might purchase lands, were disabled from holding them (*b*),—the lands so purchased being subject to escheat and forfeiture, as already explained (*c*). They were also incapable of conveying, so as to affect the crown and the lord, and that *from the time of the offence committed;* for such conveyance might tend to defeat the crown of its forfeiture, or the lord of his escheat (*d*). But as regards the present state of the law, these positions require to be considered in connection with the modern statutes affecting escheat and forfeiture, which have been noticed in a former chapter (*e*).

In like manner *corporations*, religious or other, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase, but it shall be forfeited to the lord of the fee (*f*). As to their power of *alienation*, they might in general, at the common law, make estates at their pleasure of any lands and tenements they held in their corporate right (*g*)—though, as to ecclesiastical corporations *sole*, this power was somewhat restrained by the necessity of obtaining the confirmation of certain other parties to make the alienation binding on their successors;—and with this general right of alienation the legislature has only interfered in particular instances (*h*). Thus the powers of alienation belonging to ecclesiastical corporations—as well as to such *lay* corporations as are colleges or hospitals—are now regulated by a variety of

(*b*) 2 Bl. Com. p. 290. See Bullock *v.* Dodds, 2 B. & Ald. 275.

(*c*) Vide sup. p. 444.

(*d*) Co. Litt. 42 b. But it seems that such conveyances would bind all persons except the king and the lord. (Doe *v.* Pritchard, 5 B. & Adol. 782.)

(*e*) Vide sup. p. 447.

(*f*) See however the exceptions noticed sup. pp. 455, 467.

(*g*) 2 Bl. Com. 318.

(*h*) Colchester *v.* Lowten, 1 Ves. & B. 226.

Acts, of which an account will be found in that chapter of this work which treats of the endowments and provisions of the Church (*i*). The powers of alienation belonging at common law to corporations, have also been restrained in the case of such *lay* corporations as are called *municipal* (viz., incorporated towns); for these were disabled by 5 & 6 Will. IV. c. 76, s. 94, from selling or mortgaging any lands, tenements, or hereditaments, (and in general also from demising them for any term exceeding thirty-one years,) except in pursuance of some agreement entered into by the body corporate before 5th June, 1835 (*k*): though by the same Act, and by 6 & 7 Will. IV. c. 104, s. 2, it was provided, that any disposition whatever of such lands, tenements or hereditaments might be made with the approbation of the lords of the treasury, or any three of them; and on such terms as they might think fit to sanction (*l*).

The conveyances of *idiots and insane persons* (except during a lucid interval) are also, generally speaking, void (*m*). It is said, indeed, that the feoffment of a lunatic is not absolutely *void* but *voidable* only, owing to the solemnity of the livery, which is an essential part of that conveyance (*n*)—the practical difference between a

(*i*) Vide post, bk. IV. pt. II. c. III.

(*k*) By 2 & 3 Will. 4, c. 69, s. 3, also, municipal corporations were restrained from selling lands, &c., to defray the expenses of parliamentary elections.

(*l*) See also 4 & 5 Vict. c. 38, s. 6; 5 & 6 Vict. c. 98; 8 & 9 Vict. c. 56; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49; 23 & 24 Vict. c. 16, as to the mortgage or sale of municipal corporate land for the purposes of borough prisons or court houses, or for sites of schools for the poor, &c., and as to charging municipal land with the expenses of improvements by way of drainage. As to the sale, by municipal corporations, of their church patronage, see 5 & 6 Will. 4, c. 76, s. 139; 6 & 7 Will. 4, c. 77, s. 26; c. 104, s. 3; 1 & 2 Vict. c. 31. As to grants by corporations of seaport towns, of sites for Sailors' Homes, 17 & 18 Vict. c. 104, s. 546; and as to grants by any municipal corporation of lands for public recreation or play-grounds, 22 Vict. c. 27, s. 3. And see generally the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

(*m*) Thompson *v.* Leach, Comb. 468.

(*n*) Ibid.

void and a voidable transaction being chiefly this, that the former is a mere nullity, and therefore incapable of confirmation, but the latter may be either avoided or confirmed *ex post facto* (*o*). It is also held, that, though the feoffment may be avoided during the lunatic's life by the person legally authorized to act for him; or, after his death, by his heir, or any other person interested (*p*); yet it cannot be avoided by himself, on the ground of his own past insanity; there being a maxim in the law, in regard to transactions merely *voidable*, that no man shall be allowed to stultify himself, that is, to plead his own unsoundness of mind in a court of justice (*q*). But this is a maxim which has no application where the transaction (as is the case with any conveyance, except by way of feoffment,) by one *non compos*, is absolutely *void* (*r*). And even with regard to a feoffment the doctrine above laid down must now be taken in connection with the enactment of 8 & 9 Vict. c. 106, s. 4, by which a feoffment made after 1st October, 1845, is made void at law unless evidenced by deed. Such being the state of the law with respect to *alienation* by one insane, it is laid down, on the other hand, that he is competent to *purchase* (*s*), though he cannot be compelled to retain what he purchases,—the transaction (if found to be disadvantageous to him) being liable to subsequent avoidance on the ground of his insanity (*t*).

The conveyances and purchases of *infants*, that is, persons under twenty-one, are in general not void, but voidable; and they may be avoided either by themselves in their lifetime, or by their representatives after their

(*o*) 2 Bl. Com. 293. See also Whelpdale's case, 5 Rep. 119; 2 Inst. 483; Moor, 43.

(*p*) 2 Bl. Com. 292.

(*q*) Ib.; Beverley's case, 4 Rep. 123 b; Stroud *v.* Marshall, Cro. Eliz. 398; Sugd. Pow. p. 395.

(*r*) 2 Bl. Com. 291; Yates *v.* Boen, 2 Stra. 1104; Beverley's case, ubi sup.; Sugd. ubi sup.; F. N. B. 202; Litt s. 405; Jenk. 40; 3 Mod. 310; 1 Eq. Ca. Ab. 279.

(*s*) Co. Litt. 3 b.

(*t*) See 2 Bl. Com. 292; Sugd. Purch. vol. ii p. 107, 9th edit.; Beavan *v.* M'Donnell, 9 Exch. 309; 10 Exch. 184.

death (*u*). But if one that is voidable has been confirmed by the infant on his coming of age, and he should then die, it cannot afterwards be impeached by his representative, on the ground of its having been effected during infancy (*x*). And in this paragraph, we are speaking of *conveyances* strictly so called, as distinguished from matters of *contract* only; for the contracts of an infant (unless for necessaries) are now absolutely void in all cases, and are not confirmable by the infant even upon his attaining full age (*y*).

[The case of a *married woman* is somewhat different. She may *purchase* an estate without the consent of her husband; and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent (*z*). And though he does nothing to avoid it, or even if he actually consent, the feme covert herself may, after the death of her husband, waive or disagree to the same; nay, even her heirs may waive it after her, if she die before her husband, or if in her widowhood she does nothing to express her ratification of the transaction (*a*).] But all *conveyances* of her estate by a married woman (except so far as regards her interest in land settled to her separate use) are absolutely void, unless made in such particular method as the law has specifically appointed for that purpose (*b*). And this was formerly, for the most part, by fine or recovery; but by 3 & 4 Will. IV. c. 74, it is provided that in lieu of these proceedings (which the

(*u*) See Zouch *v.* Parsons, 3 Burr. 1794; Moor, 43; Baylis *v.* Dineley, 3 Mau. & Sel. 477; Gibbs *v.* Merrill, 3 Taunt. 307.

(*x*) 2 Bl. Com. 292; 2 Inst. 483; 5 Rep. 119.

(*y*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62).

(*z*) Co. Litt. 3 a.

(*a*) Ibid.

(*b*) 2 Bl. Com. 293. By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 1, and by the like Act of 1882 (45 & 46 Vict. c. 75), s. 2, the earnings of any married woman gained by her in any employment, occupation, or trade in which she is engaged separately from her husband, or through the exercise of any literary, artistic, or scientific skill, and *all investments of the same*, shall be deemed property held and settled to her separate use.

Act abolishes) her conveyance shall, after 31st December, 1833, be by deed *acknowledged* (after having been first examined thereupon apart from her husband) in such form as therein directed, and executed with the concurrence of her husband (*c*). And in this method she may now in general dispose of any estate which she either alone, or she and her husband in her right, may have in lands of any tenure (*d*). And by 8 & 9 Vict. c. 106, s. 7, it is moreover provided, that an estate or interest in any tenements or hereditaments in England, of any tenure, may be *disclaimed* by a married woman by deed made conformably to the above provisions.

The case of an *alien* is also peculiar (*e*). For though he has always been able to acquire property of any description by purchase, yet after purchase he could, at one time, *hold* no land, house or other tenement, save only a lease for years of a house,—provided he were an alien friend and merchant; for all other purchases, when found by an inquest of office, were immediately forfeited to the king, whether in the meantime conveyed away by the alien or not (*f*); and even this limited capacity was subject to exception, for if the lease was made to an alien *artificer*, then, by statute 32 Hen. VIII. c. 16, s. 13, it was altogether void (*g*). The state of the law however on this subject has been recently brought into accordance with more enlightened views; for by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), an alien, although being and

(*c*) 3 & 4 Will. 4, c. 74, ss. 77, 79, 91; and see 17 & 18 Vict. c. 75; and in particular 45 & 46 Vict. c. 39, s. 7. As to this acknowledgment, see the following cases:—Ex parte Ann Duffill, 5 M. & G. 378; In re Maria Pickersgill, 6 M. & G. 250; In re Way and Campbell, ib., 1046; In re Sarah Woodcock, 1 C. B. 437; Bancks *v.* Ollerton, 10 Exch. 168; In re Hannah Packer, Law Rep., 5 C. P. 424.

(*d*) Vide post, bk. II. pt. I. c. XIX.

(*e*) See the definition of an alien, sup. p. 141.

(*f*) 2 Bl. Com. 293. See Anon., 4 Leon. 84.

(*g*) See Co. Litt. 2 b, and note (7) by Harg.; Jevens *v.* Harridge, 1 Saund. by Wms. 6, and n. (1); Lapierre *v.* M'Intosh, 1 Per. & Dav. 629.

remaining an alien, may now not only acquire and hold real and personal property of every description in the same manner in all respects as a natural-born British subject, but may also as freely dispose of the same. But this provision does not apply to any estate or interest acquired before the passing of that Act, and it may be remarked that it does not qualify an alien for any municipal, parliamentary or other franchise (*h*).

Having now considered the capacities of persons as alienors and alienees respectively, we may take occasion in connection with the first branch of the subject, viz., the capacity of *alienors*, to advert to certain legislative provisions which have been made at various times to prevent the inconveniences apt to arise from the disability of parties, (through insanity, infancy, coverture or otherwise, as above explained,) to exercise such powers of alienation as would otherwise be incident to their estates. And here we may refer, in the first place, to a variety of statutes which, in respect of the alienation of estates generally considered, empowered the Lord Chancellor (or committees, guardians and others acting under his authority) to execute instruments for a lunatic or infant, where loss or disadvantage would be sustained by his incapacity to execute them for himself (*i*). To these, however, a very important addition was made in the year 1856 by the 19 & 20 Vict. c. 120, in reference chiefly to the alienation of "settled estates" (*k*). It is in the case of *these*, that (by reason of limitations in favour of parties yet unborn, or owing to the infancy, coverture, or other disability of various parties in existence,) the inconveniences, above referred to, were chiefly felt; and particularly as regards

(*h*) 33 & 34 Vict. c. 14, s. 1. By this Act a previous statute (7 & 8 Vict. c. 66), which allowed aliens to hold leases for residence or trade for a term of *twenty-one* years, is repealed.

(*i*) See 3 & 4 Will. 4, c. 74, ss. 33, 91; 8 & 9 Vict. c. 97, s. 3; c. 118, ss. 20, 137; 13 & 14 Vict. cc. 35, 60; 16 & 17 Vict. c. 70; 18 & 19 Vict. cc. 13, 43; 20 & 21 Vict. c. 13; 25 & 26 Vict. c. 86, ss. 12—17.

(*k*) As to these, vide sup. pp. 252, 258, 266, 279.

the impossibility, under such circumstances, of making effectual leases or sales as the interest of the settled property was found from time to time to require. And though the Act of 1856, together with some subsequent ones passed for its amendment, has been repealed, the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), has been substituted for it with the same general object, but with more systematic and comprehensive provisions. It has now been enacted, in order to facilitate leases and sales of settled estates, that the High Court of Justice—upon the application by petition, in a summary way, of any person entitled to the possession or to the receipt of the rents and profits of any such settled estate, for a term of years determinable on his death, or for life, or for any greater interest (*l*)—may authorize leases or sales to be made of such estate (*m*). The enactments of the statute, however, are qualified by a direction that the application shall be made only with the consent of certain specified parties (*n*), unless such consent should, as it may in particular cases, be dispensed with by the court (*o*); and that the powers conferred on the court shall not be exercised where a similar application has been rejected by parliament, or where an express declaration to the contrary is contained in the settlement; or so as to authorize any lease, sale or other act beyond the extent to which, in the opinion of the court, the same might have been authorized by the settlor (*p*).

In connection with the second branch of the subject that has been under discussion, viz. the capacity of *alienees*, it may be fit here to remark, that no person can be compelled to take an estate by purchase against his will. If land,

(*l*) 40 & 41 Vict. c. 18, s. 23.

(*m*) Demises of settled estates for twenty-one years may, in certain circumstances, be made under the Act without application to the Court (see sects. 46—48); but these provisions extend only to settlements made after 1 Nov. 1856.

(*n*) Sect. 24.

(*o*) Sects. 25—28.

(*p*) Sects. 38, 39. See also sects. 55, 56. And see the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

therefore, be conveyed *in invitum*, (as not unfrequently happens, where it is given in trust by will, without the consent of the proposed trustee having been first obtained,) the effect of the conveyance may always be avoided, by the execution of a deed of disclaimer on the part of the dissentient alienee (*q*).

II. We are, secondly, to inquire *how* a man may alienate or convey; which will lead us to consider the several modes of conveyance.

[A translation or transfer of property being once admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons by whom and to whom it was transferred; or with regard to the subject matter, as of what the thing transferred consisted; or lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property, are called the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.]

These common assurances or *conveyances* (as they are otherwise termed) we shall, in succeeding chapters, examine in due order; but because they are usually transacted by means of that particular kind of instrument called a *deed*, we purpose to consider the nature of deeds separately, and in the first instance, before we enter upon the different kinds of conveyance.

(*q*) See Townson *v.* Tickle, 3 Barn. & Ald. 31; Nicholson *v.* Wordsworth, 2 Swanst. 365; Begbie *v.* Crook, 2 Bing. N. C. 70. As to disclaimer by a married woman, vide sup. p. 478.

CHAPTER XVI.

OF DEEDS.

In treating of deeds we shall consider, first, what a deed is; secondly, its requisites; thirdly, how it may be avoided; and lastly, the general rules which the law has laid down for its construction.

I. First, then, a deed is a writing sealed and delivered, and is used in a great variety of different transactions; among which, one of the most important is the alienation of real estates (*a*). We shall, accordingly, in the present chapter speak more particularly (though what is said will generally apply to others also) of such instruments as are intended to carry out that object—it being indeed, by 8 & 9 Vict. c. 106, s. 3, expressly provided, that certain conveyances in that Act specified, made after the 1st October, 1845, shall be void at law, unless made by deed (*b*). [Such a writing under seal and delivered is sometimes called a charter, *carta*, from its materials (*c*); but most usually,

(*a*) Co. Litt. 171 b. A contract reduced to writing, but *not* sealed and delivered, is called a *simple* or *parol* contract; and the same terms are used with regard to a contract by word of mouth only; vide post, bk. II. pt. II. c. V.

(*b*) The conveyances required by 8 & 9 Vict. c. 106, to be by deed are a "feoffment" (other than one made under a custom by an infant); a "partition" or an "exchange" of hereditaments, not being copyhold; a "lease," required by law to be in writing, of any hereditaments; an "assignment" of a chattel interest, not being copyhold, in any hereditaments; and a "surrender" in writing of an interest in any hereditaments, not being a copyhold interest, and not being an interest which, prior to the Act, might have been by law created without writing.

(*c*) Co. Litt. by Harg. 9 b, n. (1).

[when applied to the transactions of private subjects, it is called "a deed," *factum*, κατ' ἐξοχήν, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, that is, shall not be permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed (*d*).] And for the same reason, when an engagement has been made by way of simple contract (that is, without deed), and afterwards the very same engagement is made between the same parties by deed, the first contract is merged in the second (*e*); to which may be added this further rule, that a contract by deed is not capable of being contradicted or explained by any other contract or declaration between the same parties, which is not itself also under seal (*f*). If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and the deed so made is called an *indenture*, because each part used formerly to be cut or indented in acute angles (*instar dentium*, or serrated) on the top, or side, to tally or correspond one with the other (*g*).

(*d*) We may here remark, that there are two other species of estoppel besides the estoppel by *deed* mentioned in the text, viz. estoppel by *record*, and estoppel by matter *in pais*. The first obtains in the case where any fact is alleged in a court of record, or any judgment given therein: the second where an act is done out of court. By such matter of record, persons who were parties to the suit—and by such matter *in pais* persons who were parties to the act in question—are in general precluded from afterwards alleging matters which would be contradictory to what the record or act imports. For further information as to estoppel, and the different species thereof, see Plowd 434; Co. Litt. 260, 352 a; 1 Saund. by Wms. 325 a, n. (1) and (c); 2 Saund. by Wms. 148; Smith's Leading Cases, vol. ii. pp. 436, 460; Hill *v.* Manchester Company, 2 Barn. & Adol. 544; R. *v.* Leominster, 5 Q. B. 640; and Pargeter *v.* Harris, 7 Q. B. 708. As to the effect *in equity* of a mistaken recital in a deed, see Brooke *v.* Haymes, Law Rep., 6 Eq. Ca. 25.

(*e*) See Byles on Bills, 8th ed. p. 216; Sharpe *v.* Gibbs, 16 C. B., N. S. 527.

(*f*) Gwynne *v.* Davy, 1 Man. & G. 857.

(*g*) See Co. Litt. 47 b; Litt. s. 371. The history of the practice of

[At one time, too, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or in an indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists (*h*); and with us *chirographa*, or hand-writings (*i*); the word *cirographum* or *cyrographum*, being usually that which was divided in making the indenture;] and in the indentures of a fine, this custom continued to be observed until the abolition of that species of conveyance. But for a long time past the practice of cutting through any letters became, in all other instances, disused; and even that of indenting saw-wise: the more modern method being to cut the top of the parchment in a waving line. And neither this nor any other method of indenting is now necessary to the legal validity of the instrument (*j*).

[When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are termed *counterparts* (*k*); though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only, is not indented, but *polled* or shaved quite even; and is therefore called a *deed-poll*, or a single deed (*l*).

indenting is given in Co. Litt. by Butl. 229 a, n. (1).

(*h*) Lyndew. l. 1, t. 10, c. 1.

(*i*) Mirrour, c. 2, s. 27; Co. Litt. by Harg. 143 b, n. (4).

(*j*) In certain cases a deed *indented* is made by statute essential to the validity of the transaction. (Co. Litt. by Butl. 229 a, n. (2).) And in such cases it was, till lately, necessary that the deed should have been *actually* indented; but by 8 & 9 Vict. c. 106, s. 5, a deed, purporting to be an indenture, is to have the effect of an indenture though not actually indented. Et vide sup. p. 463, n. (*b*).

(*k*) As to discrepancies between the lease and its counterpart, see Burchell *v.* Clark, Law Rep., 2 C. P. D. 88.

(*l*) Mirrour, c. 2, s. 27; Litt. s. 371, 372; Gardner *v.* Lachlan, 8 Sim. 123.

[II. We are, in the next place, to consider the requisites of a deed. And of these the first is, that there be persons able to contract and to be contracted with, for the purposes intended by the deed; and also a thing, or subject-matter, to be contracted for: and all these must be expressed by sufficient names (*m*). Thus in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.

Secondly, the deed must be *written* or *printed* (in any character or in any language) either upon paper or on parchment; and it has been said that if on stone, board, linen, leather, or the like, it is no deed (*n*). Wood or stone may be more durable, and linen less liable to rasures, but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence (*o*).

(*m*) Co. Litt. 35 b.

(*n*) Ib. 229 a; F. N. B. 122.

(*o*) 2 Bl. Com. 297. The principal enactments now in force, regulating the *stamps* on deeds, are contained in the 55 Geo. 3, c. 184, and the Stamp Act, 1870 (33 & 34 Vict. c. 97). By the 16th section of this last statute (in substitution of a provision to the same general effect contained in the Common Law Procedure Act, 1854) it is provided, that on the production of an instrument chargeable with any duty, as evidence in any court of civil judicature, it shall be the duty of the officer of the court reading such instrument to call the attention of the judge to any omission or insufficiency of the stamp; and if the instrument be one which may legally be stamped after execution (a proviso which excludes, it may be remarked, bills of exchange and promissory notes), it may be received in evidence, saving all just exceptions on other grounds, on payment to the officer of the amount of the unpaid duty, and of the penalty payable by law on stamping after execution—which penalty is fixed, by the 15th section of the Act, at the sum of 10*l.*, together with interest on the amount of the unpaid duty where it exceeds 10*l.*—and of the sum of 1*l.* in addition.

[Thirdly, the matter of the deed must be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts of law to determine (*p*). It is not indeed absolutely necessary in law to have all the formal parts that are usually drawn out in conveyances, so as there be sufficient words to declare clearly and legally the party's meaning. But as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore they shall be here mentioned in their usual order (*q*).]

(*p*) Co. Litt. 225 a.

(*q*) Co. Litt. 6 a. In 1845, two Acts were passed to enable parties to abridge the language in which deeds relating to real property have been usually drawn, viz. 8 & 9 Vict. c. 119 and c. 124; and more effective provisions in the same behalf are contained in the statute 44 & 45 Vict. c. 41. It may also be useful to notice here that by 37 & 38 Vict. c. 78, s. 1, in the completion of any contract of sale of land made after 31st December, 1874 (subject to any stipulation therein to the contrary), the period of *forty* has been substituted for that of *sixty* years; which (prior to that Act) a purchaser, according to the practice, was entitled to require as the commencement of title. (As to this, see Prosser *v.* Watts, 6 Mad. 59; Frend *v.* Buckley, Law Rep., 5 Q. B. 213.) With regard to the practice on a sale, as soon as the abstract of instruments executed in regard to the property during the proper period, has been verified by examination of the instruments, &c., and approved by the purchaser, *he* prepares the draft of the conveyance; and when that draft is approved by the vendor, the purchaser also prepares an engrossment of the deed properly stamped, and sees to its due execution. When the transaction is not a sale, but a lease, the course is different. No abstract is delivered, and the draft and engrossment, properly stamped, of the lease are usually prepared not by the lessee but by the lessor. It may also be observed that by 37 & 38 Vict. c. 78, s. 2, and especially 44 & 45 Vict. c. 41, ss. 3, 13, under a contract to grant or assign a term of years out of a freehold or a leasehold, the lessee or assign shall not be entitled to call for the title to the freehold; and a recital in an instrument twenty years old, unless proved inaccurate, is made sufficient evidence of the facts recited therein. (See Bolton *v.* London School Board, Law Rep., 7 Ch. D. 766.)

1. The *premises* may be used to set forth the number and names of the parties, with their additions or titles; and, in the case of an indenture, the deed is always formally described as made *inter partes*, that is, as made between such an one *of the one part*, and such another *of the other part*. As to which, this distinction was formerly established, that one named as party in an indenture could not covenant therein with a stranger (or person not named as party), nor could the latter take an estate under the deed, except by way of remainder (*r*); though, on the other hand, a stranger might covenant with one who was party, and bind himself by executing the deed (*s*). But by 8 & 9 Vict. c. 106, s. 5, it is now provided, that an immediate estate and interest in any hereditaments, and the benefit of a condition or covenant respecting any hereditaments, may be taken, though the taker be not named a party to the same indenture. The premises also contain the *recital*, if any, of such deeds, agreements or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted (*t*). With respect to the last, that is, the description of the thing granted, a conveyance of any *land* will suffice (as we have elsewhere seen) to pass also the structures or buildings thereon, as well as all mines below the surface (*u*); but a conveyance of certain specified land, or of a certain house, (even adding the words *with the appurtenances*,) will not pass other land not specified, although it may have been usually occupied together with the property conveyed: unless indeed the land not specified should consist of the orchard, garden, or curtilage of a house conveyed, in which case it would pass under a

(*r*) See Reeves *v.* Watts, Law Rep., 1 Q. B. 412.

(*s*) Co. Litt. 259 b; see Salter *v.* Kidgley, Carth. 76; Storer *v.* Gordon, 3 M. & Sel. 322; Berkeley *v.* Hardy, 5 B. & Cress. 355.

(*t*) 2 Bl. Com. 298.

(*u*) Vide sup. p. 169.

grant of the house and its *appurtenances*, or even (as it should seem) under a grant of the house simply (*v*).

2, 3. [Next come the *habendum* and *tenendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed (*w*). Though this may be performed, and is sometimes performed, in the premises; in which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to, the estate granted in the premises (*x*). As if the premises describe a grant to be "to A. and the heirs of his body," *habendum* "to him and his heirs for ever," or *vice versâ;* here A. has an estate tail and a fee simple expectant thereon (*y*). But had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it (*z*). The *tenendum* "and to hold" is now of very little use, and is only kept in by custom. Formerly it sometimes went on to express the tenure by which the estate granted was to be holden; viz. "*tenendum per servitium militare, in burgagio, in libero socagio, &c.*" But all these being, as we have seen, now reduced to free and common socage,

(*v*) See Co. Litt. by Harg. 5 b, n. (1); 2 Saund. by Wms. 401, n. (2). As to the word *appurtenances*, see Co. Litt. 121 b; Hinchliffe *v.* Kinnoul, 5 Bing. N. C. 1, 25. It may be noticed here, that by the Acts of 8 & 9 Vict., referred to supra, p. 486, n. (*q*), it was provided that every deed made conformably to those Acts should, *unless any exception were specially made therein*, be held to include all houses, out-houses, &c., and hereditaments and appurtenances whatsoever to the lands therein comprised belonging, or in anywise appertaining, &c.; and also (in the case of a conveyance of the fee) the reversion and remainders, &c., and all the estate, &c., both at law and equity, of the grantor, &c. And see further the statute 44 & 45 Vict. c. 41, s. 6 (as to general words), s. 7 (as to implied covenants), and s. 63 (as to the estate clause.)

(*w*) See Burchell *v.* Clark, Law Rep., 2 C. P. D. 88.

(*x*) See Shaw *v.* Kay, 1 Exch. 412.

(*y*) Co. Litt. 21 a; Thurman *v.* Cooper, 2 Roll. Rep. 19, 23; Cro. Jac. 476. And see Goodtitle *v.* Gibbs, 5 B. & Cress. 709.

(*z*) Baldwin's case, 2 Rep. 23; Earl of Rutland's case, 8 Rep. 56.

[the tenure is never specified. Before the statute of *Quia emptores* (18 Edw. I.), it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in antient charters, that the tenements shall be holden *de capitalibus dominis feodi;* but as this expressed nothing more than the statute had already provided for, it gradually grew out of use (*a*).

4. Next follow the terms of stipulation, if any, upon which the grant is made; the first of which is the *reddendum*, or reservation whereby the grantor doth create or reserve some new thing to himself out of what he had before granted (*b*). As "rendering for the same, yearly, the sum of 10*s*.," or a peppercorn, or two days' ploughing, or the like. Under the pure feudal system, this return or rent consisted, in chivalry, principally of military services; and, in villenage, of the most slavish offices. But in socage it has usually consisted of money, though it may still consist of services, or of any other certain profit (*c*). To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed. But if it be of antient services or the like, annexed to the land, then the reservation may be to the lord of the fee (*d*).

5. Another of the terms upon which a grant may be made is a *condition;* which is a clause of contingency, on the happening of which the estate granted may be defeated; as "provided always, that if the mortgagor shall pay the "mortgagee 500*l*. upon such a day, the whole estate "granted shall determine," and the like (*e*).]

(*a*) Madox, Formul. passim.

(*b*) See Burchell *v.* Clark, Law Rep., 2 C. P. D. 88.

(*c*) Vide sup. pp. 187, 205.

(*d*) Browning *v.* Beston, Plowd. 132; Whitlock's case, 8 Rep. 71.

(*e*) As to mortgages, vide sup. p. 303.

6. As to the clause of *warranty* formerly inserted in conveyances, it has fallen into disuse, but in its connection with the previous state of the law it still deserves some attention from the student (*e*). By this clause the grantor did for himself and his heirs "warrant" and secure to the grantee the estate conveyed. And the origin of this practice seems to be in the feudal constitution, whereby, if the vassal's title to enjoy the feud was disputed, he might "vouch," or call the lord or donor to warrant or ensure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense (*f*). And so, by our antient law, if a man enfeoffed another in fee (a mode of assurance analogous to the original feudal donation), the law annexed a warranty to the grant (*g*). [So, also, after a partition or exchange of lands of inheritance, if either party or his heirs were evicted of his share, the other and his heirs were bound to warranty (*h*). And, again, upon a gift in tail or lease for life, rendering rent, the donor (or lessor) and his heirs were bound to warrant the title (*i*). But in other forms of alienation bearing no sort of analogy to the gift of a feud, no warranty whatsoever was eve held to be implied; and therefore in such cases it became necessary to add an express clause of warranty in order to bind the grantor and his heirs; though where such clause was in fact superadded, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, or yield him other lands in their stead, but that it also bound the heir of the warrantor to the same effect—provided he had other sufficient lands by descent from the warranting ancestor (*j*); and this, whether

(*e*) As to *warranty*, see Co. Litt. by Butl. 365 a, n. (1), 373 b, n. (2), where the whole subject is copiously discussed.

(*f*) 2 Bl. Com. 300; Feud. l. 2, t. 8 and 25.

Co. Litt. 384 a.

(*h*) Ib. 174, 384 a. By 8 & 9 Vict. c. 106, s. 4, it is now enacted, that an exchange or partition made by deed executed after 1st October, 1845, shall not imply any condition in law.

(*i*) Co. Litt. 384 b.

(*j*) Ib. 102 a.

[the warranty was *lineal*, or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty, as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty,—this was lineal to the younger son (*k*). *Collateral* warranty was, where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty:—this was collateral to the elder brother (*l*).]

But though the heir was only bound to insure the title of the grantee on his ancestor's warranty, provided he had assets, yet he was, whether assets descended or not, perpetually bound from claiming the land *himself* (*m*). But this doctrine being found under certain circumstances to produce inconvenient and unjust results, statutes were passed to restrain the force of a warranty in this respect in a variety of instances; and the practice itself, of inserting in deeds any clause of warranty, fell by degrees it of use (*n*).

7. [A deed of conveyance usually also contains, *covenants*,—which are clauses of agreement (*conventiones*) therein, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or to abstain from something, or to give something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like; the grantee may covenant to pay his rent, or keep the premises in repair, or not to use them in a certain manner, and the like (*o*).] By the common law, the use of the words

(*k*) Litt. ss. 703, 706, 707.

(*l*) Ib. ss. 705, 707.

(*m*) As to assets, vide sup. p. 432.

(*n*) See 6 Edw. 1, c. 3; 11 Hen. 7, c. 20; 4 & 5 Ann. c. 3, s. 21; 3 & 4 Will. 4, c. 27, s. 39; c. 74, s. 14.

(*o*) As to the effect of an *impossible* covenant, see Clifford *v.* Watts, Law Rep., 5 C. P. 577.

"demise," "grant," or "give," raised an *implied* covenant for quiet enjoyment, &c., on the part of the grantor, except so far as it might be controlled by some express covenant in the same deed (*p*); but (so far at least as regards the words "grant" and "give") the law on this head is now altered: it being enacted by 8 & 9 Vict. c. 106, s. 4, that neither of those words in any deed executed after 1st October, 1845, shall imply any covenant, except so far as they may by force of any *act of parliament* imply a covenant (*q*). A covenant in any deed gives to the covenantee and his representatives, in case of its breach, a right of action for damages against the covenantor and his representatives; and in a deed of *conveyance*, a covenant directly relating to the land conveyed will also, in general, *run with the land;* that is, not only will the original parties or their representatives, but each successive owner of the land, be entitled to its benefit, or liable (as the case may be) to its obligation (*r*). It is consequently usual, so far as covenants for title are concerned, for a person who sells land which he himself bought, to covenant only against his own acts; or if he did not acquire it in that method, then to extend the covenant as far back as to the acts of the last buyer, but no further: and this is a sufficient security to the vendee, where all former vendors have entered into a similar covenant; because all these engagements run with the land, and consequently operate for his protection (*s*).

(*p*) See Cro. Eliz. 674; Merrill *v.* Frame, 4 Taunt. 319; Baber *v.* Harris, 9 Ad. & El. 532.

(*q*) See, for example, 8 & 9 Vict. c. 18, s. 132.

(*r*) As to covenants *running with the land*, see Co. Litt. 384 b, 385 a; Shep. Touch. 161; Third Real Property Report, pp. 45—58; Spencer's case, 5 Rep. 16 a; Mayor of Congleton *v.* Pattison, 10 East, 130; Vyvian *v.* Arthur, 1 Barn. & Cress. 410; Easterby *v.* Sampson, 6 Bing. 644; Lambert *v.* Norris, 2 Mee. & W. 333; Simpson *v.* Clayton, 4 Bing. N. C. 780; Marshall *v.* Oakes, 2 H. & N. 793; Wilson *v.* Hart, Law Rep., 1 Ch. Ap. 463; Morland *v.* Cook, ib., 6 Eq. Ca. 252; Stevens *v.* Copp, ib., 4 Exch. 20; Thomas *v.* Hayward, ib., 311.

(*s*) Browning *v.* Wright, 2 Bos. & Pul. 22; and Sugd. Law Vend. vol. ii. p. 450, 10th ed. It may be

8. [Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly or by reference to some day and year before mentioned therein. Not but a deed is good, although it mention no date, or hath a false date; or even if it hath an impossible date, as the 30th of February: provided the real day of its being dated or given, that is, of its being delivered, can be proved (*t*).

Fourthly, the several parts of a deed being now discussed, we may proceed to the consideration of the *reading* of it. This is necessary, wherever any one of the parties desire it; and if it be not done on request, the deed is void as to him (*u*). If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is mis-recited; unless, indeed, it be agreed by collusion that the deed shall be read falsely, on purpose to make it void; for in such case it shall bind the fraudulent party (*x*).

Fifthly, it is necessary that the party, whose deed it is, *seal* (*y*), and now in most cases should *sign* it also. use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely antient. We read of it among the Jews and Persians, in the earliest and most sacred records of history (*z*). And in the book

remarked, that, in a transaction by way of *mortgage*, the covenants for title are not limited as above stated.

(*t*) Co. Litt. 46 b; Dyer, 28. As to the "date" of a deed, see Styles *v.* Wardle, 4 Barn. & Cress. 908.

(*u*) Reading is not necessary unless the party executing the deed requires it. (Rex *v.* Longman, 1 Nev. & M. 576.)

(*x*) Manser's case, 2 Rep. 3; Thoroughgood's case, 2 Rep. 9; Pigot's case, 11 Rep. 27.

Merely placing the finger on a seal or wafer already attached, is equivalent to sealing, and is the usual practice. (Shep. Touch. 57.) And there is indeed no necessity that there should be either wax or wafer, if only an impression be made on the parchment or paper, with the *intent* of sealing it. (See The Queen *v.* Trustees of Covent Garden, 7 Q. B. 238, n.)

(*z*) 1 Kings, c. 21; Daniel, c. 6; Esther, c. 8.

[of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase (*a*). In the civil law, also, seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament (*b*). But in the times of our Saxon ancestors, they were not much in use in England (*c*). For though Sir Edward Coke relies on an instance of King Edwin's making use of a seal about an hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation (*d*); and perhaps the charter he mentions may be of doubtful authority, from this very circumstance of being sealed; since we are assured by all our antient historians, that sealing was not then in common use. The method of the Saxons was for such as could write, to subscribe their names; and whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters (*e*). In like manner, and for the same unsurmountable reason, the Normans, (a brave but illiterate nation,) at their first settlement in France, used the practice of sealing only, without writing

"And I bought the field of "Hanameel, and weighed him the "money, even seventeen shekels of "silver. And I subscribed the "evidence, and sealed it and took "witnesses, and weighed him the "money in the balances. So I "took the evidence of the pur-"chase, both that which was "sealed according to the law and "custom, and that which was "open."—Jer. c. 32.

Inst. 2, 10, 2 and 3.

See Palgrave, Eng. Com. ccxv.

(*d*) Co. Litt. 7 a.

(*e*) "*Propriâ manu, pro ignorantiâ literarum, signum sanctæ crucis expressi et subscripsi.*" (Seld. Jan. Ang. l. 1, § 42.) And this (according to Procopius) the Emperor Justin in the East, and Theodoric King of the Goths in Italy, had before authorized by their example, on account of their inability to write.

[their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey,—himself being brought up in Normandy,—was witnessed only by his seal; and is generally thought to be the oldest sealed charter of any authenticity in England (*f*). At the Conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross (*g*). And in the reign of Edward the first, every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals (*h*). The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the crusade in the Holy Land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted [illegible]ter, and who could not, when clad in complete steel, be otherwise known or ascertained.

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds,—"*sealed* and delivered," continues to this day. The Statute of Frauds, however, (29 Car. II. c. 3,) revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as

(*f*) Lamb. Archeion, 51.

(*g*) "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in cæram impressam mutant, modumque scribendi Anglicum rejciunt.*"—Ingulph.

(*h*) Stat. Exon. 14 Edw. I.

[necessary as sealing, though it hath been sometimes held that the one includes the other (*i*).

Sixthly, it is essential to a deed that it be *delivered* by the party himself or by his certain attorney; which therefore is also expressed in the attestation, "sealed and *delivered*;" and, in practice, both sealing and delivering is held to be performed by placing the finger on the seal or wafer, at the same time uttering the words "I deliver this as my act and deed" (*k*). A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing (*l*). Moreover, a delivery may be either absolute, that is, to the party or grantee himself: or to a third person, to hold till some condition be performed on the part of the grantee: in which last case it is delivered not as a *deed*, but as an *escrow*; that is, as a scroll or writing, which is not to take effect as a deed till the condition be performed; and then it is a deed to all intents and purposes (*m*).

(*i*) 2 Bl. Com. 306; see Lemayne *v.* Stanley, 3 Lev. 1; Warneford *v.* Warneford, Stra. 764. It appears, however, to be doubtful whether signing is required by 29 Car. 2, c. 3, in the case of *deeds*. (See 1 Shep. Touch. by Preston, 56; Aveline *v.* Whisson, 4 Man. & G. 801; Cooch *v.* Goodman, 2 Q. B. 580, 597.)

(*k*) As to delivery, see Talbot *v.* Hodson, 7 Taunt. 251; Fletcher *v.* Fletcher, 4 Hare, 67; Grugeon *v.* Gerrard, 4 You. & Coll. 119; Exton *v.* Scott, 6 Sim. 31; Hall *v.* Bainbridge, 12 Q. B. 699; Doe *d.* Richards *v.* Lewis, 11 C. B. 1046.

(*l*) Perk. § 130.

(*m*) Co. Litt. 36 a. As to delivery as an escrow, see Holford *v.* Parker, Hob. 246; Simpson *v.* Sikes, 6 M. & Sel. 295; Bowker *v.* Burdekin, 11 M. & W. 128; Millership *v.* Brookes, 5 H. & N. 797; Kidner *v.* Keith, 15 C. B. (N. S.) 35; Watkins *v.* Nash, Law Rep., 20 Eq. Ca. 262. An escrow, on the performance of the condition, takes effect as a deed from the date of the sealing and delivery. (Froset *v.* Walsh, Bridg. Rep. 51; Graham *v.* Graham, 1 Ves. jun. 274.)

[Finally, a deed must be duly *attested*, that is, show that it was executed by the party *in the presence of a witness or witnesses*: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers; which were written memorandums introduced to perpetuate the tenor of the conveyance and investiture (*n*). With this view they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum, thus: "*hiis testibus Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis*" (*o*). This, like all other solemn transactions, was originally done only *coram paribus* (*p*), and frequently when assembled in the court baron, hundred, or county court (*q*); which was then expressed in the attestation, *teste comitatu, hundredo, &c.* (*r*). Afterwards the attestation of other witnesses was allowed; the trial, in case of a dispute, being still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict (*s*); till that also was abrogated by the statute of York, 12 Edw. II. c. 2. And in this manner, with some such clause of *hiis testibus*, are all old deeds and charters, particularly *Magna Charta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner (*t*). But in the sovereign's common charters, writs, or letters-patent, the style is now altered: for at present the letters-patent are attested thus: "*teste meipso*, witness ourself at West-

(*n*) Feud. l. 1, t. 4.
(*o*) Co. Litt. 6 a.
(*p*) Feud. l. 2, t. 32.
(*q*) That is to say, the antient court of that name presided over by the sheriff (vide sup. p. 126).
(*r*) Spelm. Gloss. 228; Madox, Formul. Nos. 21, 322, 660.
(*s*) Co. Litt. 6 b.
(*t*) 2 Inst. 77.

[minster, &c.," a form which was introduced by Richard the first, but not commonly used till about the beginning of the fifteenth century (*u*). Nor was the clause of *hiis testibus* entirely discontinued in royal grants till the reign of Henry the eighth (*x*); which was also the era of discontinuing it in the deeds of subjects,—learning being then revived, and the faculty of writing more general. And therefore ever since that time the witnesses have usually subscribed their attestations, either at the bottom or on the back of the deed (*y*).

III. We are next to consider how a deed may be avoided, or rendered of no effect. And from what has been before laid down, it will follow that if there be wanting any of the essential requisites before mentioned: viz. 1, Proper parties, and a proper subject matter; 2, Writing on paper or parchment; 3, Sufficient and legal words, properly disposed; 4, Reading (if desired) before the execution; 5, Sealing, and by the Statute of Frauds, in most cases, signing also; and, 6, Delivery-the instrument is a void deed *ab initio*. It may also avoided by matter *ex post facto:* as, 1. By rasure, in lining, or other alteration in any material part; u indeed a memorandum thereof, properly attested, be prior to the execution of the deed itself (*z*). 2. By breaking off or defacing the seal (*a*). 3. By delivering it up to be cancelled, that is, to have lines drawn over it in the form of lattice-work or *cancelli;* though the phrase is now used figuratively for any manner of obliteration or

(*u*) Madox, Formul. No. 515.

(*x*) Ib. Dissert. fol. 32.

(*y*) 2 Inst. 78.

(*z*) See Com. Dig. Fait (F. 1); Pigot's case, 11 Rep. 27; Matson *v.* Booth, 5 M. & Sel. 223; Hall *v.* Chandless, 4 Bing. 123; Hudson *v.* Revett, 5 Bing. 368; Davidson *v.* Cooper, 13 Mee. & W. 343. If there be an erasure or interlineation in a *deed*, it will be presumed, in the absence of proof to the contrary, to have been made at or before the time of execution. (See Tatham *v.* Cattamore, 20 L. J., Q. B. 364.) On the other hand, in a *will* the presumption is the other way. (Re James, 1 Swab. & Trist. 238.)

(*a*) Matthewson's case, 5 Rep. 23.

[defacement (*b*). 4. By the disagreement of those whose concurrence is necessary in order for the deed to stand: as of the husband, where a married woman is concerned; or of an infant or person under duress, when those disabilities are removed; and the like.

Deeds are also in some cases avoided by objections relating to the *consideration* on which they are founded, or to their want of consideration.

The consideration of a deed may be either a *good* or a *valuable* one. A good consideration is such as that of blood or of natural love and affection, where a man grants an estate to a near relation;—being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant (*c*).] Deeds made without any consideration whatever, and also those made for good, though not for valuable, consideration are said to be *voluntary*; and by force of the statute 27 Eliz. c. 4 (*d*), voluntary deeds of lands are void as against subsequent *bonâ fide* purchasers (*e*); and (by 13 Eliz. c. 5) such deeds, whether of lands or of goods, are also void as against creditors, where the grantor is indebted to such creditors at the time, to the extent of insolvency (*f*). So any deed is liable to be impeached if founded on immoral or illegal consideration, or if obtained by fraud (*g*). But in general, its efficacy

(*b*) As to the effect of cancellation, see Vin. Abr. Faits (X. 2, 3, 4); 1 Shep. Touch. 70; Todd *v.* Emly, 11 Mee. & W. 4.

(*c*) Twyne's case, 3 Rep. 83; 2 Rol. Abr. 779; Palm. 214.

(*d*) Made perpetual by 39 Eliz. c. 18, s. 31.

(*e*) See Johnson *v.* Legard, 6 M. & Sel. 60; Doe *v.* Manning, 9 East, 59; Doe *v.* Rolfe, 8 Ad. & El. 650; Metcalfe *v.* Pulvertoft, 1 Ves. & Bea. 183; Doe *d.* Richards *v.* Lewis, 11 C. B. 1035.

(*f*) See Bac. Abr. Fraud (C); Glaister *v.* Hever, 8 Ves. 200; Battersbee *v.* Farrington, 1 Swanst. 113, Holloway *v.* Millard, 1 Mod. 419; Johnson *v.* Legard, Turn. & Russ. 293; Tarleton *v.* Liddell, 20 L. J., Q. B. 507; Spirett *v.* Willows, 3 D. J. & S. 303; Freeman *v.* Pope, Law Rep., 9 Eq. Ca. 206.

(*g*) See Collins *v.* Blantern, 2 Wils. 341.

to bind the parties thereto to their engagements, will not be prevented by the mere *want* of consideration. For in this respect deeds are distinguished from simple contracts, that is, contracts not under seal; to the validity of which some consideration is essential: but a writing sealed and delivered as a deed, is supposed by the law to be made with due deliberation; and to express fully and absolutely the intention of the party by whom it is executed: and he is therefore bound by its execution, whether he received a consideration for that which it comprises, or not (*h*). We may add here, that whenever it appears that a deed was obtained by fraud, force, or other foul practice, or is proved to be an absolute forgery, such instrument is not only incapable (as above noticed) of being enforced, but may be formally set aside by the judgment or decree of a court of judicature. This was antiently the province of the Court of Star Chamber, and it now belongs to the Chancery Division of the High Court of Justice (*i*). With reference, moreover, to this subject, it is to be observed, that a deed may not only be *avoided*, but *discharged;* for by a *release* a party may be discharged from the obligations even of a valid deed (*k*).

(*h*) Bac. Read. Uses, p. 79; Bunn *v.* Guy, 4 East, 200; Irons *v.* Smallpiece, 2 Barn. & Ald. 554; Pratt *v.* Barker, 4 Russ. 507. According to Blackstone (vol. ii. p. 296), a deed made without consideration is "as "it were of no effect, for it is con- "strued to enure or to be effectual "only to the use of the grantor "himself." But this properly applies only to conveyances; and, even as to these, is too largely laid down: for it is clear, that a conveyance, if intended to be by way of mere gift, will operate accordingly; and be effectual for the benefit of the grantee, except as far as it may interfere with the rights of creditors or sub- *bonâ fide* purchasers. (See Ir- Smallpiece, 2 Barn. & Ald. 554; Pratt *v.* Barker, 4 Russ. 507.)

(*i*) See 1 Shep. Touch. 70; 2 Bl. Com. 309; 36 & 37 Vict. c. 66, s. 34.

(*k*) According to the rules of law, the release to be effectual must be itself by deed. (See West *v.* Blakeway, 2 Man. & Gr. 729.) But even prior to the Judicature Act, 1873, not only could relief be had in equity, but an action on the deed in a court of law, might be barred by a release *not* by deed, under the provisions of 17 & 18 Vict. c. 125, ss. 83—85.

IV. As to the general rules which our law has established relative to the construction of deeds, they are principally as follows:

1. A deed is to be expounded according to the intention, where the intention is clear, rather than according to the precise words used (*l*). For "*verba intentioni debent inservire;*" and "*qui hæret in literâ, hæret in cortice.*" [Therefore by a grant of a remainder, a reversion may well pass and *è converso* (*m*). And upon a similar principle, it is a maxim that "*mala grammatica non vitiat chartam,*" neither false English nor bad Latin will destroy a deed (*n*); which perhaps a classical critic may think to be no unnecessary caution.]

2. To explain an ambiguity in the language of a deed, no evidence *dehors* the deed itself is admissible (*o*). For in such cases, the doubt arises merely from the failure of the parties to express their own meaning in proper terms; and if the law allowed the difficulty to be removed by extraneous evidence, it would render precision of less importance, and introduce inconvenient laxity into the structure of deeds in general (*p*). But here it is necessary to distinguish between *patent* and *latent* ambiguities (*q*). The first are, where the doubt arises upon the face of the instrument itself; and to these the rule applies: the second are, where the doubt is introduced by the existence of a

(*l*) Chapman *v.* Dalton, Plowd. 289; Hasker *v.* Sutton, 1 Bing. 500.

(*m*) Hob. 27. And see 2 Saund. by Wms. 96 b, n. (1).

(*n*) Osborn's case, 10 Rep. 133, 2 Show. 334.

(*o*) Bac. Max. Reg. 23. The same general rule applies to written agreements *not* under seal. (See Higgins *v.* Senior, 8 Mee. & W. 844.) It is to be observed, however, that the terms of a contract may, in some cases, be expounded by reference to usage. (Spicer *v.* Cooper, 1 Q. B. 424; Grant *v.* Maddox, 15 Mee. & W. 745.)

(*p*) Or (as expressed by Lord Bacon) it would "make all deeds hollow, and subject to averments." (Bac. Max. Reg. 23.)

(*q*) As to *patent* and *latent* ambiguity, see 4 Cru. Dig. 425; 6 Cru. Dig. 165; Bac. Max. Reg. 23; Sanderson *v.* Piper, 5 Bing. N. C. 425; Doe *d.* Gains *v.* Rouse, 5 C. B. 422; Queen *v.* Wooldale, 6 Q. B. 549; Reffell *v.* Reffell, Law Rep., 1 P. & D. 139.

fact not apparent on the face of the deed; and to these the rule has no application: the reason for which seems to be, that where the ambiguity itself is produced by circumstances extraneous to the deed, its explanation must of necessity be sought for through the same medium (*r*).

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains (*s*).

4. [The construction should be *favourable*, and such that "*res magis valeat quam pereat*" (*t*). In connection apparently with which rule, it is also laid down, that if the words will bear two senses, one agreeable to and another against law, that sense shall be preferred which is most agreeable thereto (*u*). As if tenant in tail grants a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.]

5. When any thing is granted, the means necessary for its enjoyment are also granted by implication; for it is a maxim that "*cuicunque aliquid conceditur, conceditur et id sine quo res ipsa esse non potuit*" (*x*). Thus, if a m veys a piece of ground in the midst of his estate, of way to come to it, over the land not conveyed, wi pass to the grantee.

(*r*) In the case of a devise (to which, as to all other written instruments, the rule applies), a "latent" ambiguity has been thus illustrated, that if a man devise to his son John, having two sons of that name, evidence will be admitted to show which son the testator meant. See 5 Rep. 68 b; 2 Atk. 372; 2 P. Wms. 135; Grant *v.* Grant, Law Rep., 5 C. P. 727; Sherratt *v.* Mountford, ib., 8 Ch. App. 928; In re Wolverton Mortgaged Estates, ib., 7 Ch. D. 197.

(*s*) 2 Bl. Com. 379.

(*t*) See Plowd. 156; Shep. Touch. 82, 83; 2 Bl. Com. 380; 2 Saund. by Wms. 96, n. (1); Roe *v.* Tranmar, Willes, 682; James *v.* Plant, in error, 4 Ad. & El. 766; Doe *d.* Lewis *v.* Davies, 2 Mee. & W. 516.

(*u*) Co. Litt. 42 a.

(*x*) See Co. Litt. 56 a; Shep. Touch. 89; Liford's case, 11 Rep. 52; 1 Saund. by Wms. 323a, n. (6); Lord Darcey *v.* Askwith, Hob. 234; Earl of Cardigan *v.* Armitage, 2 Barn. & Cress. 211; Harris *v.* Ryding, 5 Mee. & W. 60; Hinchliffe *v.* Kinnoul, 2 Bing. N. C. 24.

6. If there be two clauses in a deed so totally repugnant to each other that they cannot stand together, the first shall be received, and the latter rejected (*y*).

7. [Ambiguous words shall be taken most strongly against the grantor, and in favour of the grantee. "*Verba fortius accipiuntur contra proferentem*" (*z*). For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest, by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided, for men would always affect ambiguous and intricate expressions, if they were afterwards at liberty to put their own construction upon them. But, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but where all other rules of exposition fail; and it does not apply to a grant by the Crown, at the suit of the grantee (*a*).]

(*y*) 2 Bl. Com. 381. See Shep. Touch. 88; Hard. 94, Doe *d.* Leicester, 2 Taunt 113, Doe *d.* Spencer *v.* Pedley, 1 Mee. & W. 677. The however, in such case, when to d... on a *dense*, seems to be to The f... the latter clause as the instru... followed. (See Co. Litt. are 1126; Plowd 541; Doe *d.* Spencer *v.* Pedley, ubi sup.)

(*z*) See Co Litt. 36 a; Bac. Max. Reg. 3; 2 Bl. Com. 380; Doe *v.* Edwards, 1 Mee. & W. 556; Bullen *v.* Denning, 5 Barn. & Cress. 842.

(*a*) See Bac. Max. Reg. 3.

CHAPTER XVII.

OF ORDINARY CONVEYANCES—AND FIRST, OF THOSE AT THE COMMON LAW.

THE branch of law which relates to "conveyances," or the instruments of voluntary alienation, is properly of a practical character, and seems in the nature of things capable of being regulated with great simplicity. It involves, however, in the English jurisprudence, considerations of a very complex and subtle kind, and has been elaborated into a highly artificial system, known under the denomination of *conveyancing*,—a system which maintains its own separate body of practitioners and professors, and constitutes a science in itself (*a*).

In the earlier times, and indeed down to so late a period as the reign of Henry the eighth, the chief distinction between the different modes of conveyance, as regards lands of free tenure, to which alone our attention is at present directed, was this, that they were either by matter *in pais*, or by matter of *record* (*b*); the first, which were the ordinary class, comprehending such as were transacted between two or more persons *in pais*, in the country—that is, according to the old common law, upon the very spot to be transferred; the second, such as were effected by an assurance in the superior courts of justice (*c*). But in and subsequent to the reign just men-

(*a*) See 44 Geo. 3, c. 98, s. 14. As to conveyancers, see 23 & 24 Vict. c. 127, s. 34.

(*b*) As to *records*, vide sup. pp. 53, 483, n. (*d*): and see the same note, as to matter *in*

(*c*) 2 Bl. Com. 294.

tioned, various acts of parliament have been passed, the effect of which has been to introduce a new class of conveyances; distinguished from the more antient ones, as deriving their force and authority from these statutes, and not from immemorial custom, or the common law of the realm. And it will be found convenient, in discussing the general subject of conveyances, to keep the latter distinction, as well as the former, prominently in view.

We shall therefore divide the conveyances of land of freehold tenure, first, into conveyances of the *ordinary* kind, being in effect the same with those antiently described as *in pais:* and secondly, into conveyances by *matter of record;* which, as compared with the other, are of a rarer or more special description. The first of these, we shall again subdivide into two classes, first, conveyances at *common law;* secondly, conveyances *by statute law:* and the conveyances at common law will constitute the subject of the present chapter.

I. A Feoffment. In the course of our past disquisition, we have already had frequent occasion to refer to this method of conveyance, because it was for ages the only method in ordinary use by which our ancestors were wont to convey the freehold of land in possession; and the doctrines relating to it are by consequence very closely connected with the fundamental principles of the law of real property, and essential to their illustration. And for the same reason, we shall proceed now to give a somewhat fuller account of its nature and properties, than its actual importance, in practice, would seem to justify. For it is necessary here to apprize the reader, that this conveyance has now fallen, in great measure, into disuse, having been almost entirely supplanted by some of that class which are founded on the statute law of the realm.

A feoffment, then, is derived from the verb to enfeoff, *feoffare* or *infeudare*, to give one a feud, and is a method of alienation applicable to the purpose above described,

viz. that of conveying an estate of freehold in possession in a corporeal hereditament; and to that purpose only (*e*).

[This conveyance is plainly derived from—or is indeed itself the very mode of—the antient feudal donation; for though it may be performed by the word "*enfeoff*" or "grant," yet the aptest word of feoffment is "*do*," *give*, or "*dedi*," *given* (*f*). And it is still directed and governed by the same feudal rules; insomuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo*," is, in other words, become the maxim of our law with relation to feoffments, "*modus legem dat donationi*" (*g*). And therefore, as in pure feudal donations, the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donesse presumatur, quam in donatione expresserit;*" so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremories of law being performed) hath barely an estate for life (*h*). For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducement to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. It has therefore been the practice in all feoffments, from time immemorial, to limit, by express words, the nature of the estate intended to be conveyed.

But by the mere words of the donation the feoffment

(*e*) A reversion or remainder, however, and the particular estate on which it is expectant, may be created by the same feoffment (vide sup. p. 322). And so a freehold reversion already created, if expectant on a particular estate for years, may be transferred by feoffment, with the consent of the particular tenant. (Co. Litt. 48 b.) But where his consent is not given, the conveyance must be by grant, and the livery is void. (Litt. s. 567; Co. Litt. ubi sup.)

(*f*) Co. Litt. 9 a; vide sup. p. 176.

(*g*) Wright's Ten. 21.

(*h*) Co. Litt. 42 a.

[is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*, without which the transaction cannot operate as a feoffment (*i*). This livery of seisin is no other than the pure feudal investiture or delivery of corporal possession of the land or tenement, which was held absolutely necessary to complete the donation (*k*). "*Nam feudum sine investiturâ nullo modo constitui potuit*" (*l*); and an estate was then only perfect when, as the author of Fleta expresses it in our law, "*fit juris et seisinæ conjunctio*" (*m*).

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the *lord:* and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards investitures were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means, might know against whom to bring their actions.

In all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law, *plenum dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession;* which possession could not be acquired without both an actual intention to possess, and an actual seisin or entry into the premises, or part of them in the name of the whole (*n*).

(*i*) Litt. s. 70.

(*k*) Vide sup. p. 177.

(*l*) Wright's Ten. 37.

(*m*) L. 3, c. 15, s. 5.

(*n*) "*Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem*

[And even in ecclesiastical promotions where the freehold passes to the person promoted, corporal possession is required to this day to vest the property completely in the new proprietor; who, according to the distinction of the canonists, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession (*o*). Therefore in ecclesiastical dignities, possession is given by "instalment;" in rectories and vicarages, by "induction;" without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir, as we have seen, has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands (*p*).

Yet the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases antiently allowed, by transferring something near at hand, in the presence of credible witnesses; which, by agreement, should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. As among the Jews, we find the evidence of a purchase thus defined in the book of Ruth: "Now this "was the manner in former time, in Israel, concerning "redeeming and concerning changing, for to confirm all "things; a man plucked off his shoe, and gave it to his "neighbour: and this was a testimony in Israel" (*q*). So among the antient Goths and Swedes, contracts for the

introire."—Ff. 41, 2, 3.—And again: "*traditionibus dominia, non nudis pactis, transferuntur*."—Cod. 2, 3, 20.

(*o*) Decretal. l. 3, t. 4, c. 40. Vide sup. p. 430, where it is that an heir before entry cannot maintain an action of trespass. So under the rule that formerly required a title by descent to be traced from the person last seised of the inheritance, the heir was incapable, before entry, of being made the root of vide sup. p. 396.

(*q*) Ruth, ch. iv. v. 7.

[sale of lands were made in the presence of witnesses, who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses (*r*). Thus, too, with our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of lands (*s*).] And to this day, the conveyance of our copyhold estates is usually made by the seller's delivery of a rod or verge to the lord or his steward, and then by the re-delivery of the same to the purchaser.

Conveyances *in writing* were the last and most refined improvement. For the transaction, when depending on the remembrance and testimony of witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, without an absolute sale thereof; and of making them liable to a multitude of conditions and minute designations. Writings were consequently introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed: and now by the Statute of Frauds (29 Car. II. c. 3), s. 1, no estate created by livery of seisin only, and not in writing signed by the party, or his agent by writing lawfully authorized, shall be of any force except to constitute an estate at will. Since this statute, therefore, a feoffment has not been effectual unless evidenced by writing; though the transaction has been nevertheless considered as deriving its legal force from the livery, and not from the written instrument (*t*). And now by 8 & 9 Vict. c. 106, s. 3, a feoffment made after 1st October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced *by deed* (*u*).

(*r*) Stiernhook, de Jure Sueon. l. 2, c. 4.

(*s*) Hickes, Dissert. Epistolar. 85.

(*t*) Co. Litt. 48 a; et vide sup. p. 491, n. (*a*).

(*u*) As to feoffment by an infant,

[Livery of seisin is either "in deed" or "in law." Livery in *deed* is thus performed. The feoffor, lessor, or his attorney for the purpose, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney as by the principals themselves in person), come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee (all other persons being out of the ground) a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door (the house being quite empty of people), and deliver it to the feoffee in the same form: and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others (*x*). And in all these cases it is prudent and usual to indorse the livery of seisin on the back of the deed, specifying the manner, place and time of making it, together with the names of the witnesses (*y*). And thus much for livery in deed.

Livery in *law* is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise.] By the antient law, indeed, if he dared not enter through fear of his life or bodily harm, his *continual claim*—made yearly

in gavelkind, vide sup. p. 213. A deed of feoffment is also called a *charter* of feoffment. (Co. Litt. 9 b, 36 a, n. (1).)

(*x*) Co. Litt. 48 a; West. Symb. 251. Further information will be found in Blackstone (vol. ii. p. 315) on this subject; and particularly as to the cases in which more than one livery will be required, in consequence of the lands lying in different counties or the like.

(*y*) As to the manner of making livery of seisin, see also Roe *v.* Rashleigh, 3 Barn. & Ald. 156; Doe *v.* Taylor, 2 Nev. & M. 508.

in due form—would suffice without an entry (*z*). But this was altered by 3 & 4 Will. IV. c. 27, s. 11, which provides that no right of entry or action shall in future be preserved by *continual claim*. Livery in law cannot be given or received by attorney, but only by the parties themselves (*a*).

By feoffment, not only a fee simple may be conveyed, but an estate tail or an estate for life; for these (as we have seen) are all estates of freehold. But the *term* "feoffment" is considered as importing more properly a conveyance of the *fee simple;* while the conveyance of an *estate tail* is more technically called a *gift;* that of an estate for life, a *demise* or *lease* (*b*).

The last point (already incidentally noticed), that we shall mention with respect to this conveyance, is, that up to a recent period it was distinguished from others by the following property; that when made (without fraud) by a person in actual possession, it would always have the effect of passing to the feoffee a freehold, either by right or by wrong (*c*). For it was a delivery of the actual seisin, that is, of the actual possession, as for an estate of freehold, in fee, in tail or for life; so that if the feoffor was himself lawfully seised to the full extent of the estate that he conveyed, a freehold as of right would pass; and even if he was not lawfully seised, or not lawfully seised to that extent, a freehold would still pass, though a freehold by *wrong* (*d*). And when by such means, or by any other,

(*z*) Litt. s. 421; Co. Litt. 48 b; 2 Inst. 483.

(*a*) Co. Litt. 52 b.

(*b*) Litt. s. 59; Co. Litt. 9 a. Blackstone (vol. ii. p. 316) enumerates "gift" as a separate conveyance; but, as he himself remarks, "it differs in nothing from a feoffment, but in the nature of the estate passing by it."

(*c*) Vide sup. pp. 465 et

(*d*) Litt. ss. 599, 611; Co. Litt. 367 a; Fermor's case, 3 Rep. 77; Taylor v. Horde, 1 Burr. 60; Co. Litt. by Butl. 330 b, n. (1); 2 Sand. Us. pp. 18, 20; Doe v. Hall, 2 Dow. & Ry. 38; Doe v. Lynes, 3 Barn. & Cress. 388; Doe v. Taylor, 5 Barn. & Adol. 575. The doctrine in the text, though no longer in force, yet deserves attention from its tendency to illustrate the principles of

a wrongful or tortious freehold was created, the effect was, that the person lawfully entitled to the freehold in possession was *disseised*; and if there were any persons in reversion or remainder, such reversion or remainder was *displaced* or *divested*, so that each of these parties ceased to retain (strictly speaking) an *estate*; though each nevertheless possessed a *right of entry*; that is, was entitled, in his proper turn, to enter, and eject the wrong-doer, and thus to revest his own estate (*e*). But all this doctrine, *so far as regards the operation of a feoffment by wrong*,—long diminished in practical importance by the growing rarity of feoffments, and by other causes, and latterly involved in some degree of obscurity,—is now abolished by the provision of 8 & 9 Vict. c. 106, s. 4, to which we have had frequent occasion already to refer, that "a feoffment made after the 1st October, 1845, shall not have any *tortious* operation."

II. A Grant is effected by mere deed, without livery of seisin, containing words expressive of the intention to convey. The appropriate words are "*dedi et concessi*," "have given and granted," but they may be supplied by others of the like import (*f*). This was the regular

the law of real property. It is to be observed, that, independently of a feoffment, a tortious estate may be created by *any* act that produces a disseisin, or any wrongful ouster of the freehold. (Co. Litt. 2 a.) The nature of these wrongful acts will be explained in that part of the work which treats of civil injuries, vide post, bk. v. c. VIII.

(*e*) Co. Litt. 251 a, b, 327 b; 1 Saund. by Wms. 319, n. (1); Focus *v.* Salisbury, Hard. 401, 402. In the particular case, however, of a wrongful feoffment by tenant in tail in possession, the effect was different; for it was a *ance*, which formerly deprived the reversioner or remainder-man (as well as the issue in tail) even of his *right of entry*, and left him nothing but a *right of action*. (Co. Litt. 327 b.) But by 3 & 4 Will. 4, c. 27, s. 39, a discontinuance is no longer to be attended with this effect (see also 8 & 9 Vict. c. 106, s. 4). A discontinuance, besides, involved (as we have seen) no *forfeiture* of the particular estate; though it was otherwise with a wrongful feoffment by tenant for life or years. Vide sup. p. 465.

(*f*) 2 Sand. Us. 47. The word "give" or "grant" is by 8 & 9

method, by the common law, of transferring estates in expectancy (that is, reversions and remainders) in corporeal hereditaments, as feoffment was of transferring a freehold estate in possession (*g*). And the same mode, viz. grant, was appropriate also to the transfer (for whatever estate) of hereditaments purely incorporeal—such as advowsons, commons, rents, and the like,—of which we are to treat hereafter (*h*). For it obviously results from the nature both of things incorporeal, and of corporeal things in expectancy, that no livery can be made of them: not of the first, because they are not capable of possession; nor of the last, because the possession is in the particular tenant, and not in the grantor. For which reason they were formerly both said to *lie in grant;* while corporeal hereditaments in possession were said to *lie in livery* (*i*). And as the latter passed by force of the livery of seisin, so the former passed by force of the deed. But the conveyance by grant is now made applicable to all kinds of hereditaments; for by 8 & 9 Vict. c. 106, s. 2, it is enacted, that, "after the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery" (*j*); and, indeed, the use of the word *grant* is no longer necessary in any conveyance, the word *convey* being now made sufficient in all cases (*k*). It is also to be remarked under this head, that by the antient law, besides the grant itself, an additional ceremony was required where a reversion or remainder was the subject of transfer; viz. the *attornment* of the tenant of the particular

Vict. c. 106, s. 4, to imply no covenant as to title or otherwise; vide sup. p. 492.

(*g*) Co. Litt. 172 a, 332 a, b.

(*h*) As to incorporeal hereditaments, vide sup. p. 171; post, c. XXIII.

(*i*) 2 Rep. 31 b; Doe *v.* Cole, 7 Barn. & Cress. 213.

(*j*) It will be seen hereafter (post, p. 512) that the effect of this enactment was to make a *grant* the usual method of passing real estate *inter vivos*, under the modern system of conveyancing.

(*k*) 44 & 45 Vict. c. 41, s. 49.

estate, to the grantee (*l*). But by the statute 4 & 5 Anne, c. 3, this requisite is now dispensed with (*m*).

III. A Lease (or "demise") is a conveyance by which a man grants lands or tenements (usually with the reservation of a rent) to another, for life, for years, or at will (*n*), such estate being short of the lessor's own interest therein (*o*); for if it be to the full extent of that interest, it is then properly an "assignment," and no lease (*p*). A lease of land for life, being a freehold interest, could not be constituted by the common law without livery of seisin; and therefore the lease could, in such case, be only by way of feoffment (*q*): but if the estate were for years, or at will, no livery was required (*r*); nor was a deed, or even any writing, formerly essential to the efficacy of a demise of land for whatever period (*s*). The law, however, on this subject has been altered; for by the Statute of Frauds, (29 Car. II. c. 3,) ss. 1, 2, all leases whatever, with the exception of those not exceeding three years and with a rent of not less than two-thirds of the improved annual

(*l*) Litt. ss. 568, 569; Doe *v.* Finch, 4 Barn. & Adol. 303.

(*m*) See Doe *d.* Agar *v.* Brown, 2 El. & Bl. 331. As to attornment generally, vide sup. pp. 469, 471.

(*n*) Litt. s. 58. A lease may be either of land in the possession of the lessor, or of land whereof he has the reversion or remainder; for of the latter he may make a lease for years *in future*, to take effect in possession on the determination of the prior particular estate; and he may also grant the reversion for a term short of his own interest therein: but such grant must be by deed. See Co. Litt. 47 a; Bac. Abr. Leases (N.).

(*o*) As to the nature of leases generally, see Co. Litt. 43 b; and Bac. Abr. "Leases and Terms of "Years;" "where" (says Blackstone, vol. ii. p. 323, *in notis*), "the "subject is treated in a perspicuous "and masterly manner: being supposed to be extracted from a "manuscript of Sir Geoffrey Gilbert." As to leases under powers defectively executed, see 12 & 13 Vict. cc. 26, 110; 13 & 14 Vict. c. 17.

(*p*) 2 Bl. Com. 317.

(*q*) Litt. s. 59.

(*r*) Ibid.

(*s*) But a lease of an *incorporeal* hereditament could not be made at common law without deed. (Co. Litt. 49; Bird *v.* Higginson, 6 Ad. & El. 824; Rex *v.* Marquis of Salisbury, 8 Ad. & El. 716.)

value, must have been put into writing and signed by the lessor or his agent lawfully authorized in writing. And, by the statute of 8 & 9 Vict. c. 106, (sect. 3,) it has been now further provided, that a lease, required by law to be in writing, of any tenements or hereditaments, made after 1st October, 1845, shall be void at law unless made *by deed* (*t*): though, on the other hand,—by the effect of the same statute, (sect. 2,) providing that all corporeal hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery—a lease even for life may now be effected by grant, without livery of seisin. It results, however, from the former observations with respect to estates for years, that a lease of land for years will not vest in the lessee a complete estate for all purposes, until he has made *entry* on the land demised; and that in the mean time he takes nothing beyond an *interesse termini* (*u*).

When the lease is for years only, the estate may be granted to take effect in possession either immediately, or at some future time; and, in the latter case, the lessee has of course no right to enter until that future time has arrived (*v*). But it is important carefully to distinguish these leases *in futuro* from mere *agreements to let*; for an intending lessor may, without using such words as actually to divest himself of any interest present or future, simply engage to grant a lease at a future period; and as no interest in the mean time passes, this will be a mere

(*t*) It may be remarked that a parol instrument demising for more than three years, though void as a lease (under the 8 & 9 Vict. c. 106), and therefore passing no interest, may be good as an *agreement*, and if broken may be decreed to be specifically performed (see Parker v. Taswell, 27 Law J., Ch. 812; or be ground for an action. (See Bond v. Rosling, 1 B. & S., Q. B. 371; Tidey v. Mollett, 16 C. B., N. S. 298; Stranks v. St. John, Law Rep., 2 C. P. 376; Martin v. Smith, ib., 9 Exch. 50.) In Hand v. Hall, ib., 2 Ex. D. 355, a lease not under seal was made for one year, with an option to the tenant, at the end of that term, to take on the premises for three years and a half more. This lease was held valid by the Court of Appeal.

(*u*) Vide sup. p. 287.

(*v*) Vide sup. p. 321.

agreement, and no lease (*x*). And with respect to such agreements, it is material to remark, that by 29 Car. II. c. 3, s. 4, they are required, even where the term agreed for is less than three years, to be in writing (*y*).

[The usual words of operation in a lease are "demise, "grant, and to farm let," *demisi concessi et ad firmam tradidi* (*z*). For *farm* or *feorme* is an old Saxon word signifying provisions (*a*); and it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions—in corn, in poultry, and the like,—till the use of money became more frequent: so that a farmer, *firmarius*, was one who held his lands upon payment of a rent or feorme; though at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate or lands so held upon farm or rent.] Neither the words "to farm let," however, nor any of the others above specified, are necessary to effect a demise; any expressions sufficiently indicating the intention of one of the parties to divest himself of the possession, for a determinate period, in favour of the other, being clearly sufficient to constitute a lease (*b*). With reference to the covenants contained in a lease, we may here observe, that it results from what has been before stated as to such as *run with the land* (*c*), that the lessee is liable not only to the original landlord or reversioner, but in case of the grant of the reversion, then to the grantee also, for the future performance of all such covenants contained in the lease, on the part of the lessee; and is entitled, on the other hand, to enforce against the grantee, as well as the original landlord, the future performance of all such as are con-

(*x*) See Rollason *v.* Leon, 7 H. & N. 73.

(*y*) See Inman *v.* Stamp, 1 Starkie, N. P. C. 12; Edge *v.* Strafford, 1 Tyrw. 293.

(*z*) Co. Litt. 45 b.

(*a*) Spelm. Gloss. 229.

(*b*) Bac. Abr. Leases, &c.; Doe *v.* Ashburner, 5 T. R. 163; Barry *v.* Nugent, 5 T. R. 165, n.; Poole *v.* Bentley, 13 East, 168.

(*c*) Vide sup. p. 492.

tained in it on the part of the lessor (*d*). As to the covenants in a lease, it is also material to notice, that, to improve the landlord's security, the lease usually contains a proviso that, on breach of any of the covenants by the tenant, the landlord shall be at liberty to *re-enter*, and resume and hold possession of the premises as if no lease of them had ever been made. Such a proviso constitutes, in case of a breach of covenant by the tenant, a most advantageous addition to the landlord's remedies, which would otherwise be confined, in some cases, to a right of action for damages on the covenant (*e*).

It may be here observed that where lands are let for agricultural purposes, the custom of the country has, in many parts of England, secured to the tenants of such holdings an adequate compensation, at the determination of the tenancy, from the landlord for what has been expended on the land demised during the later portion of the tenancy, in the way of seed, manure and labour (*f*). Such compensation, under the name of tenant right, has been usually adjusted on a certain recognized scale by valuers selected by the parties; but in the year 1875, an endeavour was made to place these matters on a more satisfactory basis than local and occasionally discrepant customs, by direct legislation; and, at the same time, to include within the provisions of the Act, in favour of the tenant, certain improvements not usually allowed for, but in respect of which it was nevertheless felt right that he should have a proper return from his landlord—and moreover to make obligatory in farm leases a longer notice to quit than is necessary and sufficient

(*d*) See Thursby *v.* Plant, 1 Saund. by Wms. 230 b; Wright *v.* Burroughes, 3 C. B. 344.

(*e*) It may be noticed, with regard to the *non-payment of rent*, that the landlord, in addition to his remedy by re-entry and his action on the covenant, has also a right of *distress*, as to which, vide post, bk. v. c. 1.

(*f*) The landlord, and not the incoming tenant, is, in the absence of a special agreement binding the latter, liable to the outgoing tenant for tenant right, and a custom to the contrary is bad. (See Bradburn *v.* Foley, Law Rep., 3 C. P. D. 129.)

by the general law of landlord and tenant as described in a former part of this volume. With these objects was passed the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), and of the provisions of this statute the following is a general account. And, in the first place, it is to be noticed that its enactments only apply to cases where the holding (which must be at the least to the extent of two acres) is either wholly agricultural or wholly pastoral, or partly one and partly the other (*g*); but on the other hand are applicable whether the letting of the land is for term of years or for lives, or for lives and years, or from year to year, or at will (*h*): and with regard to such lettings the act enables the tenant, on the determination of the tenancy, to claim from his landlord compensation in respect of any improvement he has executed on his holding which shall come within either of the three classes specified therein (*i*), according to an amount agreed upon between the parties; or, in case of dispute, settled according to certain rules laid down in the act in reference to the particular class to which the improvement claimed belongs (*k*), by referees and an umpire (*l*), from whose award an appeal lies to the judge of the county court of the district in which the holding or the larger portion of it is situate; and should any question

(*g*) 38 & 39 Vict. c. 92, s. 58.

(*h*) Sect. 4.

(*i*) Class I. (for making which the landlord's *previous consent in writing* must have been obtained) includes improvements by way of drainage, building, laying down permanent pasture, planting osier beds, hops and orchards, making water meadows, water courses, ponds and wells, works of irrigation, gardens, roads and bridges, and reclaiming or warping land. Class II. (in respect of which *notice in writing* must, previous to the execution, have been given to the landlord) includes boning, chalking, claying, liming and marling land, and clay burning. Class III. includes application to land of purchased manure, artificial or otherwise, and consumption by cattle, sheep or pigs, of cake or other feeding stuff not produced on the holding. (Sect. 5.)

(*k*) Sects. 7—16.

(*l*) If the parties agree there may be a single referee appointed by them jointly. If there are two referees they may themselves appoint an umpire, or he must in some cases be appointed by the county court or by the Inclosure (Sects. 20, 23.)

of law arise there is an ultimate appeal, by way of special case, or by motion, to the High Court of Justice (*m*).

The act also, among many others which our limits forbid us to specify, contains the following provisions:—1. In cases to which it applies, where a half-year's notice expiring with a year of the tenancy is by law necessary and sufficient for the determination of a tenancy from year to year, a *year's* notice so expiring shall by virtue of the act be necessary and sufficient for the same—except only in the case of the tenant being adjudged a bankrupt or filing a petition for liquidation (*n*). 2. Nothing in the act contained shall prevent a landlord and tenant from entering into and carrying into effect such agreement as they think fit, or interfere with the operation thereof (*o*); though on the other hand the act shall apply to every contract of tenancy made after 14th February, 1876, unless the parties shall agree in writing that the act, or any particular part or provision of it, shall *not* apply to the contract (*p*). 3. A tenant shall not be entitled to claim compensation under the act and also under any custom of the country or contract, in respect of the same work or thing (*q*).

IV. [An Exchange is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution (*r*). The estates exchanged must be equal in quantity, not of *value* (for that is immaterial), but of *interest*;—as fee simple for fee simple, a lease for years for another lease for years, and

(*m*) 38 & 39 Vict. c. 92, s. 36.

(*n*) Sect. 51. (See Wilkinson *v.* Calvert, Law Rep., 3 C. P. D. 360.)

(*o*) Sect. 54.

(*p*) Sect. 56. It is believed that such agreements are of very frequent occurrence, and have caused the statute to be but little used.

(*q*) Sect. 59.

(*r*) Co. Litt. 50, 51; Eton College *v.* Bishop of Winchester, 3 Wils. 468. See the provision, 8 & 9 Vict. c. 106, s. 4, mentioned in the next page.

[the like (*s*). And no livery, even in exchanges of freehold, was, at the common law, necessary to perfect the conveyance (*t*); for each party stood in the place of the other, and occupied his right, and each of them had already had corporal possession of his own land.] On the other hand, by the Statute of Frauds, (29 Car. II. c. 3,) ss. 1, 3, an exchange was required to be in writing; and by the statute 8 & 9 Vict. c. 106, s. 3, it must now be by deed, in every case except that of an exchange of copyhold. [Moreover, by the common law, entry must have been made on both sides; for if either party died before entry, the exchange was void for want of sufficient notoriety (*u*). And it was held, that if two parsons, by consent of patron and ordinary, exchanged their preferments, and the one was presented, instituted, and inducted, and the other was presented and instituted, but died before induction,—the former should not keep his new benefice, because the exchange was not completed, and therefore he must return back to his own (*x*). It was also held, that if after an exchange of lands or other hereditaments, either party was evicted of those which were taken by him in exchange, through defect of the other's title, he should return back to the possession of his own, by virtue of the implied warranty contained in all exchanges (*y*).] But this doctrine seems now to be affected by the provision of 8 & 9 Vict. c. 106, s. 4, whereby it is enacted, that an exchange of any tenements or hereditaments made by deed executed after 1st October, 1845, shall not imply any condition in law. It may be proper, too, before we conclude this head, to point the reader's attention to the distinction between the conveyance properly called an *exchange* (that is, one made in the

(*s*) Litt. ss. 64, 65. As to whether an exchange by lessee for twenty years with lessee for thirty or forty years would be good, see Perk. sect. 275; 2 Shep. Touch. 296.

(*t*) Litt. s. 62.

(*u*) Co. Litt. 51 b.

(*x*) Perk. s. 288. As to exchange of preferments, see Downes *v.* Craig, 9 Mee. & W. 166.

(*y*) As to warranty, vide sup. p. 490.

method above pointed out), and a transaction where the parties execute *mutual conveyances* of their respective lands under some other form or forms of assurance; for to such cases the doctrines above laid down, as to *exchanges*, have no application (*z*).

V. [A Partition is where two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them and thereafter to hold in severalty, each taking a distinct part (*a*). Here, as they all originally hold *pro indiviso* or promiscuously, it is necessary that they shall all mutually convey and assure to each other the several estates, which they are to take and enjoy separately (*b*).] By the common law, coparceners might make partition by parol only, accompanied by livery; but joint-tenants and tenants in common could not make it otherwise than by *deed*; though it would appear that if perfected by livery such deed did not require to be signed (*c*). However, under the Statute of Frauds, (29 Car. II. c. 3,) an instrument in writing, signed by the party or his agent, was made necessary in every case of partition by way of

(*z*) See Eton College *v.* Bishop of Winchester, 3 Wils. 491. It is further to be observed, that exchanges of land may now be effected, through the agency of the Inclosure Commissioners; and that the provisions of the General Inclosure Acts on this subject are applicable not only in cases of inclosure, but even as regards lands not subject to be inclosed, or in respect of which no proceedings for inclosure are pending. (See 8 & 9 Vict. c. 118, ss. 92, 147; 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 22 & 23 Vict. c. 43.)

(*a*) As to partition, see Co. Litt. 165 b.

(*b*) Vide sup. p. 338.

(*c*) 2 Bl. Com. 324. Blackstone adds that the statutes 31 Hen. 8, c. 1, and 32 Hen. 8, c. 22 (which subjected joint-tenants and tenants in common to a writ of partition), did not affect the manner of conveyance when the partition was effected without writ. It may be remarked that in case of a partition between *joint tenants* (no delivery of seisin from one co-tenant to the other being required) a mutual *release* is the proper method of assurance.

agreement (*d*). And by the provisions of 8 & 9 Vict. c. 106, s. 3, partitions of all hereditaments (not being copyhold) made after 1st October, 1845, shall be void at law, unless made not only in writing, but by deed (*e*).

The common law conveyances which have been hitherto considered, are all (it may be remarked) of a *primary* or *original* character. Those which remain are of a *secondary* or *derivative* sort, which presuppose some other conveyance precedent; and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,—

VI. A Release; which may be defined as a conveyance of an ulterior interest in lands or tenements to a particular tenant, or of an undivided share therein to a co-tenant (the relessee being in either case in privity of estate with the relessor,)—or of the right to such lands or tenements, to a person wrongfully in possession thereof (*f*). It was always effected without livery of seisin, even though the interest conveyed were freehold; for the doctrine of release is founded on this principle, that though the freehold in possession could not pass at common law without livery (which made a notoriety to the country), yet where another person was already in the possession, the reason and propriety of that ceremony failed; and the grantor might consequently convey such right or interest as he had, by

(*d*) Co. Litt. by Harg. 169 a, n. (4). See, however, sup. p. 496, n. (*i*).

(*e*) It is also provided by 8 & 9 Vict. c. 106, s. 4, that a partition of any tenements or hereditaments made by deed executed after 1st October, 1845, shall not imply any condition in law. Partitions, as well as exchanges, may now be effected under provisions specially devised for that purpose in the General Inclosure Acts. See the Acts referred to, sup. p. 521, n. (*z*).

(*f*) As to releases, see Co. Litt. 264 a. Some account of the early state of the law respecting them will be found in Hist. Eng. Law, by Reeves, vol. iii. p. 354.

mere deed (*g*). A deed, however, is essential to the efficacy of this conveyance (*h*); and the proper operative word to be employed in it, is that of "*release*" (*i*): yet it is to be observed, that the release of a right may not only be *express*, but may also be *implied by law* from circumstances; and when it is of this kind, it may take place without deed (*k*).

A release (in conformity with the definition) may enure in several ways.

1. [By way of enlarging an estate, or *enlarger l'estate*. This is the species of release that most frequently occurs, and it consists of a conveyance of the ulterior interest of the remainderman or reversioner to the prior particular tenant: as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But to the validity of such releases as these, it is necessary that the estate of the relessee should be a *complete and vested* one (*l*), for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void; and this because the lessee has, in such case, a mere *interesse termini*, and not an estate upon which a reversion can properly be expectant (*m*).] And further there must be a

2 Bl. Com. 325; Gilb. Ten. 53.

(*h*) Co. Litt. 264 b.

(*i*) Vide sup. p. 492, as to the use of this word in reference to the obligations of a deed. To which it may be added that this is the technical term employed in *all* cases where a renunciation of any right or claim is concerned; whether as real estate or things personal, or rights of action.

(*k*) Co. Litt. ubi sup.

(*l*) Co. Litt. by Butl. 270 a, n. (3). If the estate of the relessee, therefore, is an estate in possession, he ought to be in actual possession of the land (see Litt. ss. 455, 456, 459); for otherwise his estate is incomplete. But otherwise actual possession of the land is not necessary: for "if a man make a "lease for years, with remainder for "years, and the first lessee doth "enter, a release to him in the "remainder for years is good to "enlarge his estate."—Co. Litt. 270 a, 270 b.

(*m*) "Before entry," says Lord Coke, "the lessee has but *interesse* "*termini*, an interest of a term and "no possession; and therefore a

privity of estate between the relessor and relessee; that is, the one of their estates must be so related to the other as to make but one and the same estate at law: as in the case where the ulterior estate conveyed is a reversion or remainder mediately or immediately expectant upon the particular estate of the relessee; all which, in contemplation of law, form parts of the same estate, as being derived, at the same time, out of the same original seisin (*n*). Thus, if a man seised in fee make a lease for years, with remainder over for life, a release to the lessee for years is good; for he hath both a privity and an estate; and a release to him in the remainder for life is good also (*o*). But if A. makes a lease to B. for life, and B. makes a lease for years: and afterwards A. releases to the tenant for years, this release is void to enlarge his estate, because there is no privity between A. and the lessee for years (*p*). Upon the same principle a release to a tenant at will, is good, because he has a sufficient estate for the purpose, and a privity with the lessor; but a release to a tenant at sufferance, is void because he has a possession without privity (*q*). 2. [A release may enure by way of passing an estate, or *mitter l'estate*; as where one of two coparceners releases all her right to the other, this passeth the fee simple of the whole (*r*). But in this species of release, as well as the former, there must be a privity of estate between the relessor and relessee (*s*); and therefore one tenant in common cannot release to his companion, because

" release, which enures by way of " enlarging an estate, cannot work " without a possession: for before " possession, there is no reversion." (Co. Litt. 270 a.) It is to be observed, however, that if the estate for years be created by a conveyance under the Statute of Uses, and not at common law, no actual entry is necessary to give effect to the release. The reason of this will appear when we treat of conveyances of that class.

(*n*) See 2 Prest. Conv. 324; 2 Bl. Com. 325; Gilb. Ten. 70, 71; Goodright *v.* Forrester, 1 Taunt. 602.

(*o*) Co. Litt. 273 a.

(*p*) Ib. 272 b.

(*q*) Ib. 270 b. As to tenants by sufferance, vide sup. p. 294.

(*r*) Co. Litt. 273.

(*s*) 2 Bl. Com. 325; Co. Litt. 273 b.

[they have distinct freeholds, and there is no necessary unity of title between them (*t*). 3. It may enure by way of *passing a right*, or *mitter le droit*; as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful (*u*). 4. By way of *extinguishment*; as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate (*x*). 5. By way of *entry and feoffment*; as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee (*y*).] And here we may observe, with respect to the four last species of release, that the fee may be conveyed by any of them without the use of words of inheritance (*z*): in which respect they differ from releases to enlarge the estate; and indeed from feoffments also, and from grants; for as to all these, it is a general rule (though subject to exception in particular cases) that an estate of inheritance cannot be created without the word *heirs* (*a*), or the phrase *heirs of the body*, or, since the Conveyancing Act, 1881 (*b*), the equivalent words "in fee simple" or "in fee tail."

VII. [A Confirmation is of a nature nearly allied to a release (*c*). Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a par-

(*t*) Co. Litt. 200 b; Gilb. Ten. 74; vide sup. p. 351.

(*u*) Litt. s. 466.
Ib. s. 470.
Co. Litt. 275 a.

(*x*) Ib. 9 b.

(*a*) Litt. s. 1; Co. Litt. 8 b; vide sup. p. 237.

(*b*) 44 & 45 Vict. c. 41.

(*c*) As to confirmations, see Co. Litt. 295 b, 308 b.

[ticular estate is increased (*d*); and the words of making it are these, "have given, granted, ratified, approved, and confirmed" (*e*). An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion; yet if he hath confirmed the estate of the lessee for years, *before the death of tenant for life*, it is no longer voidable but sure (*f*). The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.] It is to be observed that a confirmation (like a release, and for the same reason) has always been effectual without livery of seisin, even though a freehold estate be the subject (*g*). Moreover, a deed is essential to the validity of a conveyance of this kind (*h*); though there may be a confirmation *implied by law* from circumstances, as well as a confirmation by deed (*i*).

VIII. [A Surrender, (*sursum redditio*, or rendering up,) is of a nature directly opposite to a release; for as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater (*k*). It is defined as a yielding up of an estate for life or years to him that hath an immediate reversion or remainder; wherein the particular estate may merge or drown, by mutual agreement between them (*l*). And accordingly it is held, that the surrenderee must have such an estate, that the estate surrendered may be capable of merging in

(*d*) Co. Litt. 295 b.

(*e*) Litt. ss. 515, 531. As to confirmations, see also Hist. Eng. Law, by Reeves, vol. iii. pp. 354, 355.

(*f*) Litt. s. 516.

(*g*) 2 Bl. Com. 326.

(*h*) Shep. Touch. by Preston, vol. ii. p. 312.

(*i*) See Co. Litt. 295 b; Doe v. Jenkins, 5 Bing. 469; Jenkins v. Church, Cowp. 482; Ludford v. Barber, 1 T. R. 86; Doe v. Archer, 1 Bos. & Pul. 531.

(*k*) As to surrender, see Co. Litt. 373 b.

(*l*) Co. Litt. 337 b; Burton v. Barday, 7 Bing. 757.

[it; so that tenant for life cannot surrender to him in remainder for years (*m*). A surrender is done by these words, "hath surrendered, granted and yielded up," or the like (*n*). And though the estate surrendered be for life there was not, at common law, any occasion for livery of seisin (*o*); for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards.] Nor was either deed or other writing required, at common law, to effect the surrender of land (*p*). But by the Statute of Frauds, (29 Car. II. c. 3,) s. 3, no lease (except of copyhold) shall be surrendered otherwise than by deed or note in writing, signed by the party or his agent lawfully authorized by writing (*q*): though this provision did not prevent there being a surrender created without writing by *operation of law;* for a surrender, like a confirmation, may be implied by law from circumstances (*r*). And now by the statute 8 & 9 Vict. c. 106, (s. 3,) a surrender in writing of an interest in any tenement or hereditament,—not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st October, 1845, shall be void at law

(*m*) Perk. s. 589.

(*n*) 2 Roll. Ab. 497.

(*o*) See Farmer *v.* Rogers, 2 Wils. 26; Co. Litt. 338 a; Shep. Touch. 307; Sleigh *v.* Bateman, Cro. Eliz. 487.

(*p*) Co. Litt. ubi sup.; Shep. Touch. ubi sup.

(*q*) See Roe *v.* Archbishop of York, 6 East, 86; Gore *v.* Wright, 8 Ad. & El. 118. A mere cancellation of the lease is, of itself, no surrender; (Doe *v.* Thomas, 9 Barn. & Cress. 288,) but may, under particular circumstances, be evidence of one. (Walker *v.* Richardson, 2 Mee. & W. 882.) As to the effect of such cancellation, see also Lord Ward *v.* Lumley, 5 H. & N. 87, 656.

(*r*) Shep. Touch. 301; Bac. Ab. Leases (S.) 3. See also as to surrenders *in law*, Davison *v.* Stanley, 4 Burr. 2210; Phipps *v.* Sculthorpe, 1 Barn. & Ald. 50; Dodd *v.* Acklom, 6 Man. & G. 672. And the cases cited in the judgment in Nickells *v.* Atherstone, 10 Q. B.

unless made not only in writing but *by deed*. It is laid down that, upon a surrender, no entry is required to complete the title of the surrenderee, except for the purpose of bringing an action for any trespass committed; so that if a tenant for life or years surrender at a place off the land, to him in reversion, and the latter agree to it, he has the land in him without further ceremony (*s*).

As to the effect of this conveyance, we may also remark that if a lessee for life or years make a lease for years, reserving rent, and then surrender his estate to his landlord, the estate for years made out of the estate so surrendered will continue notwithstanding the surrender; but the under-tenant, at common law, was, by such surrender of the original lease, held discharged (in general) from the rent and other covenants of *his* lease; for the reversionary estate to which they were annexed ceased, on the surrender, to exist (*t*). And hence in the case of leases, surrendered for the purpose merely of being renewed, it was in the power of the under-lessees (by refusing to surrender, in their turn, notwithstanding they had covenanted to do so), greatly to prejudice their immediate landlords, the first lessees. But by the statute 4 Geo. II. c. 28, it was provided in the particular case of a lease surrendered for the purpose of *renewal*, that the new lessee should (without a surrender of the under-lease) have the like remedy as to the rent and covenants, and the under-lessee should hold, as if the original lease had been kept on foot: and that the chief landlord should have the like remedy, by distress or entry on the lands and hereditaments comprised in such under-lease, for the rents and duties reserved by the renewed lease, (so far as they exceeded not those reserved by the original lease,) as he would have had if such original lease had been kept on foot (*u*). And by 8 & 9 Vict. c. 106,

(*s*) Shep. Touchstone, 307, 308; Thompson *v.* Leach, 2 Vent. 198.

(*t*) Lord Treasurer *v.* Barton, Moore, 94; Webb *v.* Russell, 3 T. R. 402.

(*u*) See Doe *v.* Marchetti, 1 B. &

(s. 9,) it is now provided more generally, that when the reversion expectant on a lease (made either before or after the passing of that Act) of any tenements or hereditaments of any tenure shall, after the 1st October, 1845, be surrendered or merge, the estate which shall, for the time being, confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, —to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted,—be deemed the reversion expectant on the same lease.

IX. An assignment of land or real estate is properly a transfer, or making over to another, of a person's whole interest therein, whatever that interest may be; but it is more particularly applied to express the transfer of an estate for life or years. And an assignment for life or years differs from a lease only in this, that by a lease a man grants an interest less than his own, reserving to himself a reversion; by an assignment, he parts with the whole property, and the assignee consequently stands in the place of the assignor (*x*). Thus where a lease is assigned, the assignee (as well as the lessee) is liable to the landlord or reversioner, for the future performance of the covenants made by the lessee: and such assignee remains liable until he assigns over in his turn to another person (*y*). And this liability attaches to him even without entry (*z*). However, he is not liable by force of the assignment, except on such covenants as *run with the*

Ad. 715; Cousins *v.* Phillips, 35 L. J., Ex. 84. As to the renewal of leases of *crown* lands, see 8 & 9 Vict. c. 99, s. 7.

(*x*) 2 Bl. Com. 326.

(*y*) Taylor *v.* Shum, 1 B. & Pul. 21; Burnett *v.* Lynd, 5 B. & C. 589; Moule *v.* Garrett, Law Rep., 5 Exch. 132; and on app., 7 Exch. 101. As to the lessee continuing liable notwithstanding the assignment, see Barnard *v.* Godscall, Cro. Jac. 309.

(*z*) Williams *v.* Bosanquet, 1 Brod. & Bing. 238.

land (*a*),—a term that has been explained in a former chapter (*b*). And he is also entitled to enforce against the reversioner any covenant of that kind which the lease contains in favour of the lessee; and in case the reversioner conveys his interest to another, then to enforce it, also, against the grantee of the reversion (*c*). It is to be observed, however, that if the transfer be for a single day short of the residue of the term, no liability or claim on the original covenants can arise between the transferee on the one hand, and the reversioner or the grantee of the reversion on the other hand, for it is then an under-lease and no assignment; and the alienee not coming precisely into the place of the alienor, is in no privity with the reversioner (*d*). No deed or other writing was necessary, at common law, to the validity of an assignment (*e*); though in the case of a lease for life, it could not be effected without livery of seisin (*f*); but by the Statute of Frauds, (29 Car. II. c. 3,) the same provision as to the necessity of a deed or written instrument was made, with respect to an assignment, as before mentioned in the case of a surrender (*g*). And now, by 8 & 9 Vict. c. 106, s. 3, an assignment of a chattel interest not being copyhold, in any tenements or hereditaments, made after 1st October, 1845, shall be void at law, unless made not only in writing but by deed; while on the other hand, by the effect of the same statute, sect. 2, an assignment even of a lease for life may now be effected by deed of *grant* without livery of seisin. The proper operative words in an assignment are "assign, transfer, and set over;" but it may be effected by any words which are sufficient to express the intention (*h*).

(*a*) Whitton *v.* Peacock, 2 Bing. N. C. 411.

(*b*) Vide sup. p. 492.

(*c*) 32 Hen. 8, c. 34; Thursby *v.* Plant, 1 Saund. by Wms. 230 b; Wright *v.* Burroughes, 3 C. B. 685.

(*d*) Holford *v.* Hatch, Doug. 182; Baker *v.* Gostling, 1 Bing. N. C. 19.

(*e*) Noke *v.* Awder, Cro. Eliz. 373, 436; Moore, 419, S. C.

(*f*) Earl of Derby *v.* Taylor, 1 East, 502.

(*g*) Vide sup. p. 527.

(*h*) Parminter *v.* Webber, 8 Taunt. 593. As to an agreement to assign,

X. [A defeasance is a collateral deed, made at the same time with another conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*, or totally undone (*i*). And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day (*k*).] And this, when executed at the same time with the original conveyance, was considered as part of it by the antient law: and, on that account only, indulged (*l*). For a conveyance of the freehold, at common law, could not be defeated or recalled by a deed of defeasance executed *afterwards*; and if such conveyance contained a proviso that it should be lawful for the grantor by subsequent act to revoke the same, the proviso was void for repugnance (*m*). But things that were merely executory, or to be completed by matter subsequent,—as rents, of which no seisin could be had till the time of payment, and so also annuities, conditions, warranties, and the like, —were always liable to be recalled by defeasances made subsequent to the time of their creation (*n*). Defeasances of land are now of rare occurrence (*o*): the practice in

not amounting to an assignment, see Hartshorn v. Watson, 5 Bing. N. C. 477. A transaction which would be void as an assignment may still be held valid as an under-lease, if the intention of the parties can be so effected. (See Poultney v. Holmes, 1 Stra. 405; Pollock v. Stracey, 16 Law Journ. (Q. B.) 132.) An under-lease *for the whole term* will operate as an assignment. (Beardman v. Wilson, Law Rep., 4 C. P. 57.)

(*i*) The term is derived from the French verb, *defaire*, *infectum reddere*. As to a defeasance, see Co. Litt. 236 b.

(*k*) Vide sup. p. 486.

(*l*) Co. Litt. 236.

(*m*) Ib. 237 a. But in a conveyance, not at common law but *under the Statute of Uses*, a proviso that the grantor shall have power to revoke the uses is good, and not repugnant.—Ibid. This subject will be noticed in the next chapter.

(*n*) 2 Bl. Com. p. 327; Co. Litt. 237 a. If a thing, however, which is executory in its commencement be afterwards executed, it cannot then be defeated by a subsequent defeasance; Co. Litt. by Butler, 237 a, n. (1).

(*o*) In the case of Cotterill v.

modern times being (as in the case of a mortgage) to include in the same deed, both the conveyance of the land to the alienee, and the conditions (if any) to which it is to be subject, and by which its effect may be defeated.

XI. We will conclude this chapter by mentioning that there was also a common law conveyance termed a *lease and release* (*p*). It obtained where one, desirous to convey in fee, first made a lease to the proposed alienee, —for example, for one year—which demise, if perfected by actual entry, conferred on him a complete estate of leasehold (*q*). The lessee then became capable of receiving a release of the reversion, for he would be tenant of the particular estate on which that reversion was expectant (*r*), and the next step therefore was to execute a release of the land to him and his heirs, so that by the conjoint operation of the two conveyances he became without livery of seisin tenant in fee in possession (*s*). The release in this case operated by way of enlargement of the estate of the

Purchase, Lord Talbot said "he "should always discourage the "practice of drawing an absolute "deed and making a defeasance, "as it were the face of fraud." (Ca. temp. Talbot, 61, 64.)

(*p*) See 2 Sand. Us. p. 70, where it is said not to have been frequent. See Hist. Eng. Law, by Reeves, vol. iii. p. 357; vol. iv. p. 356.

(*q*) 2 Bl. Com. 144.

(*r*) Vide sup. p. 522.

(*s*) It will be seen, in the next chapter, that this common law "lease and release" was the foundation of the conveyance of the same name which operated under the Statute of Uses (vide post, p. 510).

CHAPTER XVIII.

OF CONVEYANCES UNDER THE STATUTE OF USES.

THE subject of common law conveyances having now sufficiently engaged our attention, we are next to examine those which derive their force from the statute law; among which, the first place is due to conveyances founded on the Statute of Uses.

It is evident from what was said in a former chapter, that this statute entirely failed to accomplish the object contemplated by its provisions (*a*). For instead of extinguishing equitable ownerships, it made only a slight alteration in the formal words by which they might be constituted, and changed their name from *uses* to that of *trusts*—under which they took root more firmly, and flourished in greater vigour than before. But while the statute thus missed its mark, it led to accidental results of a most important character, the nature of which we shall here proceed to explain.

The methods employed for creating or raising uses at the period when the statute passed, were principally three: viz. feoffment, covenant to stand seised to uses, and bargain and sale (*b*). A feoffment transferred the legal estate in the manner already explained when we treated of common law conveyances; and it was applied to the purpose now in question, by declaring in the deed of feoffment or some other collateral instrument to whose *use* the feoffee was to hold, and defining the estate or interest for which such use was to subsist (*c*). The covenant to stand seised and the

(*a*) Vide sup. pp. 356, 371.

(*b*) Hist. Eng. Law, by Reeves, vol. iv. p. 161—163.

(*c*) 1 Sand. Uses, pp. 172, 173; Sugd. Gilb. Introd. xlii.

bargain and sale emanated from the doctrine of equity that the owner of land who covenanted to stand seised of it to the use of some near relative, or who entered into a bargain and sale of it for pecuniary consideration,—was thenceforward to be considered as holding it to the *use* of such covenantee or bargainee respectively (*d*). As soon as this doctrine was established, the object of putting land into use was accomplished with the greatest facility, by the mere execution on the part of the owner of a deed of covenant to stand seised (or of bargain and sale), for such estate as therein mentioned, to the use of the intended *cestui que use*: because a use conformable to that estate immediately arose in favour of the covenantee or bargainee (*e*). And though the original owner continued seised (there being no transfer of the legal estate), his ownership became nominal only, for he held subject to the use. In these two latter modes, therefore, as well as by feoffment, it had become the common practice to raise uses before the Statute of Uses passed.

After that event, it became obvious that uses had now become capable of being turned to a new purpose (though one that had not been designed by the legislature), viz. the conveyance of the legal estate upon a principle unknown to the common law. For we may remember that by the effect of the statute, whenever there is a *seisin to a use*, that use is executed, or (in other words) transmuted into the equivalent legal estate (*f*). A party, therefore, who desired to alienate his land after the passing of this Act, had only to create (by whatever means) a seisin to the use of the proposed alienee, for such interest as intended (*g*); and a legal estate of the same description was then transferred to such alienee by force of the statute, as effectually as if it had been conveyed by one of the ordinary methods of the common law. It was also obvious that this new prin-

(*d*) Vide sup. p. 361.
(*e*) 1 Sand. Uses, p. 172; Fox's case, 8 Rep. 94 l, n.
(*f*) Vide sup. p. 366.
(*g*) 1 Cruise, Dig. 440.

ciple of conveyance presented parties with the means of escaping from the many restrictions of the common law, with respect to the modification of estates; for uses (as we have seen) might be limited with greater freedom than the land itself (*h*); and as by a covenant to stand seised, or a bargain and sale, a seisin to uses might be created without any solemnity beyond the simple execution of a secret deed,—those who were desirous to avoid the publicity and other inconveniences connected with livery of seisin, effected their purpose with ease, by resorting to one of these methods, and making it a medium for the operation of the new principle (*i*). Under these circumstances it naturally happened that the same three methods which, before the statute, had been ordinarily employed to raise uses, now began to be employed as modes of transferring the legal estate for the benefit of the transferee; and in connection with this they were also made, as often as occasion required, to fulfil their former office of creating equitable interests. And to effect this nothing more was necessary than to insert in them a limitation of one use upon another, in the manner described in the chapter on Uses and Trusts; for while the use was executed by the statute, and became the legal estate, the second retained, under the name of *trust*, the equitable character designed (*k*). Such is the principle of conveyances under the Statute of Uses, considered as a class. They comprise not only the feoffment to uses, the covenant to stand seised, and the bargain and sale, but also that species called a lease and release, (added to their number soon after the statute passed,) and a fifth, now recently introduced, which may be denominated a grant to uses. And this last, as we shall have occasion presently to explain, has nearly superseded all the rest, in the practice of conveyancing. Yet as some acquaintance with the four former will continue to be of importance, so far as the investigation of antient

(*h*) Vide sup. p. 364.
(*i*) 2 Sand. Uses, p. 40: 2 Bl. Com. 337.
(*k*) Vide sup. p. 371.

titles to land, and the history of the law in general, is concerned, it will be necessary here to examine, individually and in some detail, the whole that have just been enumerated. And we will begin with—

I. A Feoffment to Uses (*l*). This was the ordinary conveyance of the common law, of which the nature was explained in the last chapter, but with a limitation to uses superadded (*m*). Thus if A. were desirous to convey to B. in fee, he might do so by enfeoffing a third person, C. (of course with livery of seisin), to hold to him and his heirs to the use of B. and his heirs; the effect of which was to convey the legal estate in fee simple to B. For the legal estate passed to C. by means of the livery, in like manner as it would have done before the statute; but no sooner had this taken place, than the limitation to uses began to operate, and C. thereby became seised to the use limited; the consequence of which was, that, by force of the statute, the legal estate was *eo instanti* taken out of him, and vested in B., for the like interest as was limited in the use, that is, in fee simple. B. thus became the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method, however, involving as it did the necessity of making livery of seisin, was never of frequent occurrence in modern practice

II. A Covenant to stand seised to Uses (*o*). This was a conveyance adapted to the case where a person seised of land in possession, vested remainder, or reversion, proposed to convey his estate to his wife, child, or kinsman (*p*); and in its terms it consisted of a covenant by the owner to stand seised to the use of the intended trans-

(*l*) See 1 Sand. Uses, p. 173; 2 ib. p. 13.

(*m*) Vide sup. p. 505.

(*n*) 2 Sand. Uses, p. 13.

(*o*) See Roe *r.* Tranmaer, Willes, 682; Doe *r.* Davies, 2 Mee. & W. 503.

(*p*) 2 Sand. Uses, pp. 34, 94.

feree (*q*). Before the Statute of Uses, this would merely have raised a use in favour of such party; but since that Act, the legal estate was transferred to him; for, the covenantor being by the effect of his covenant seised to the use of the covenantee, the statute immediately executed that use. But the conveyance in question was held to be ineffectual, unless the parties to it stood to one another in the relation of marriage or of near consanguinity; for no use was raised in contemplation of equity, in case of a mere contract, unless such contract was founded on proper consideration, such as *natural affection*, and therefore, unless the parties were connected as above, there was no use for the statute to take effect upon (*r*). On account of inconveniences connected with this principle, and for other reasons, it became by degrees wholly laid aside

III. A Bargain and Sale. This was a conveyance adapted to the case where a person seised of land in possession, vested remainder, or reversion, proposed to convey it to some other person. In its terms, it consisted of a bargain and sale for money by the owner to the intended alienee; and at common law such bargain and sale might be a verbal one merely. By the effect of this contract, the bargainor became seised to the use of the bargainee, in fee, in tail, for life, or for years, (according to the nature of the limitation); and this before the statute was the whole effect of the instrument; but afterwards the statute executed that use, and clothed the alienee with a commensurate legal estate. But as it was essential to the efficacy of a covenant to stand seised, that it should be made in consideration of natural affection, so, for the like reason, it was requisite in the case of a bargain and sale, that it should be founded on *pecuniary* consideration;

(*q*) 2 Bl. Com. 338.

(*r*) 2 Sand. Uses, pp. 90, 94; Sharrington *v.* Stratton, Plowd. 300; Hist. Eng. Law, by Reeves, vol. iv. p. 162.

(*s*) 2 Fonb. Tr. Eq. 25; 2 Bl. Com. 338; 2 Sand. Uses, p. 91; 2 Saund. by Wms. 97 a, n. (b). See Doe *d.* Starling *v.* Prince, 10 L. J. (C. P.) 223.

for otherwise no use would be raised, and there would be nothing for the statute to operate upon.

With respect to this conveyance, it is to be observed, that it possessed in a peculiar degree the recommendation to which we before adverted, of enabling parties to transfer a freehold without livery of seisin. For the covenant to stand seised could rarely be made available to the purpose, as it operated only between persons standing in particular relations to each other; but in the extensive class of conveyances which take place between seller and purchaser, a bargain and sale afforded the ready means of dispensing with livery of seisin and attornment; since by the insertion into the deed of a small sum of money, as the nominal consideration of a transfer, it was easy, even when the transaction was not really of the pecuniary kind, to obtain the benefit of this mode of conveyance (*t*). And not only the freehold in possession might be thus conveyed without livery, but a remainder or reversion might also be passed by the same method (as indeed it might also by covenant to stand seised), without *attornment* (*u*). But secret transfers of land were strongly opposed (for reasons before sufficiently explained) to the antient policy of the law. As soon therefore as the legislature perceived that these might be accomplished with facility, by means of a bargain and sale, it hastened to provide a remedy; and that devised for the purpose was, to connect with this new conveyance a new ceremony, calculated to insure publicity, and to operate as a permanent memorial of the transaction (*x*). It was accordingly enacted by the statute 27 Hen. VIII. c. 16 (called the Statute of Inrolments), that no bargain and sale should enure to pass a *freehold*, unless the same were by *deed indented*, and *enrolled* within six months after its date, in one of the courts

(*t*) 2 Sand. Uses, p. 41.

(*u*) Ib. p. 40; 1 Saund. by Wms. 234 b, n. (4); Shove *v.* Pincke, 5 T. R. 124. As to attornment, vide sup. p. 469.

(*x*) 2 Sand. Uses, pp. 43, 44, 51; Bac. Use of Law; 2 Bl. Com. 338.

of Westminster Hall, or else with the *custos rotulorum* of the county (*y*).

A bargain and sale, it is to be observed (and the remark is equally applicable to a covenant to stand seised), was also capable of conferring a complete estate for years, without entry; a property that belonged not to a conveyance at common law: for a common law lease for years gave (as formerly shown) no complete estate until entry has been made (*z*). It is, therefore, to be understood that if a man bargained and sold (or covenanted to stand seised in respect of) his land for a term of years, the use thus raised was executed and became a complete estate for years, by force of the statute, without any additional ceremony (*a*); upon the same principle that a bargain and sale, or covenant to stand seised, in respect of a freehold interest enured to pass the freehold, without livery of seisin (*b*). And though the Statute of Inrolments provided compensation for the tendency of bargains and sales to dispense with livery in freehold conveyances, it made no similar provision to guard against their effect in conveying a term of years without entry; for these chattel interests being then but of a precarious nature, were not thought of sufficient importance to be included in its enactment (*c*). A bargain and sale for term of years was therefore effectual without inrolment (*d*); and differed, in this respect, from a bargain and sale for an estate of freehold.

It is material to observe, that no particular form of

(*y*) 2 Sand. Uses, p. 41. Hereditaments lying within any city or town corporate, the officers of which have authority to make inrolment of deeds, were excepted from this statute. (Ib. p. 66.)

(*z*) Vide sup. p. 532.

(*a*) It should be observed, however, that even in cases to which the Statute of Inrolments did not apply, the bargain and sale was required under the Statute of Frauds (29 Car. 2, c. 3, to be in writing; and by 8 & 9 Vict. c. 106, to be by deed.

(*b*) Barker v. Keate, 2 Mod. 249; Mallory's case, 5 Rep. 286.

(*c*) 2 Bl. Com. 338. Blackstone says they were still of this character "till about six years" before the date of the statute.

(*d*) Ibid.

words was held essential to the legal efficacy either of a bargain and sale or of a covenant to stand seised (*e*). "Bargain and sell" were the words of transfer ordinarily used in the one case, and "covenant to stand seised" in the other. But other words would have the same effect (*f*); and the distinctive character of each of these conveyances was determined by the consideration on which it was founded (*g*). Where the use was raised upon a pecuniary consideration, the conveyance was good as a bargain and sale, whatever the terms used: where it arose on the consideration of natural affection, it availed as a covenant to stand seised (*h*). If the words employed, however, were such as to indicate that there was no intention of transferring the property by the instrument in which they were contained; for example, if they amounted merely to an engagement to convey by a future instrument no use would arise, and consequently no estate would pass (*i*).

The rule, which required a bargain and sale to be founded on pecuniary consideration, was held to be matter of form only, and sufficiently complied with if the conveyance *purported* to be so founded; and for this purpose any trivial sum might be inserted, though the consideration which really passed between the parties were of larger amount, or even though it were in fact not of a pecuniary nature (*k*). It was also immaterial whether the sum so inserted were actually paid or not (*l*).

IV. A Lease and Release. The conveyance so described was of a compound description, consisting of two separate parts; first, a bargain and sale; secondly, a common law conveyance of release: and, (like the bargain and sale,) it was adapted to the case where a person seised

(*e*) 2 Sand. Uses, pp. 56, 90; Doe v. Davies, 2 Mee. & W. 503.
(*f*) 2 Sand. Uses, p. 90.
(*g*) 2 Fonb. Tr. Eq. 47.
(*h*) Sand. ubi sup.; 2 Saund. by Wms. 96 b, n. (1), n. (2).
(*i*) 1 Sand. Uses, pp. 118, 120.
(*k*) 2 ib. p. 54.
(*l*) Sugd. Gilb. 96.

of land in possession, vested remainder, or reversion, proposed to convey his interest to another.

A conveyance of the same denomination was among those (it will be remembered) which obtained occasionally at the common law, and by its means an estate might be conveyed by lease and entry to a proposed alienee, without livery of seisin, in the manner explained in our last chapter (*m*). Now when the Statute of Inrolments had rendered it impossible to effect a secret and summary conveyance of the freehold, by the method of bargain and sale (*n*), the practitioners of the day were left to explore new means of attaining that favourite object; and they accordingly invented for the purpose, a new conveyance under the Statute of Uses; the hint and name of which was supplied by this common law expedient of lease and release (*o*). Instead of a lease, the conveying party was made to execute a bargain and sale for some leasehold interest, for example, for the term of one year. This, without any inrolment, passed the legal estate for a year to the bargainee, (the Statute of Inrolments extending to freeholds only,) and the estate so transferred was complete (as we have seen) without actual entry (*p*). The transferee therefore was capable of receiving a release of the freehold and reversion (*q*); which release was accordingly granted to him on the next day (*r*). This compound conveyance—which is said to have been invented by Serjeant Moore soon after the Statute of Uses (*s*)—was called, like its common law prototype, a lease and release; though, properly speaking, it was rather a *bargain and sale* with release. As it was competent to pass the freehold without livery of seisin, entry, or inrolment, or any other ceremony than the execution of the deeds themselves (*t*),

(*m*) Vide sup. p. 532.

(*n*) Vide sup. p. 538.

(*o*) 2 Sand. Us. p. 71; 2 Prest. Conv. 219.

(*p*) Vide sup. p. 539. See Sand. ubi sup.

(*q*) Sand. ubi sup.; 2 Prest. Conv. 219.

(*r*) Ibid.

(*s*) 2 Bl. Com. 338; Hist. Eng. Law, by Reeves, vol. iv. p. 355.

(*t*) 2 Sand. Uses, p. 72.

and was in some other technical points more advantageous than a bargain and sale, it soon grew into familiar use (*u*); and became so generally established as almost entirely to supersede every other method of conferring a freehold estate, whether at common law, or under the Statute of Uses. It is almost superfluous to add, that its legal validity, though formerly doubted by great lawyers, became, in progress of time, too firmly settled to be shaken (*x*).

On the release, some use was ordinarily engrafted. If it was one to the releasee himself in fee, he took the legal estate as at common law (*y*); for this was not such a use as the statute executed (*z*); but if the use were declared to a third person, it would be executed by the statute, and the legal estate in the freehold conveyed would pass accordingly to *him*.

The lease (or bargain and sale) and the release in practice, used always to constitute separate deeds, the former bearing date the day before the latter; but if comprised in the same deed, they were understood to be equally effectual (*a*).

V. A Grant to Uses. Though, for the reasons already given, we have not thought ourselves at liberty to dispense altogether with the former learning relative to the lease and release, and to the other methods before enumerated in this chapter, the reader will not fail to observe that by the obvious effect of that most important provision of the 8 & 9 Vict. c. 106, s. 2, to which we formerly had occasion to refer,—abolishing the antient maxim that corporeal hereditaments lie in livery only and not in grant, by enacting that they "shall, as regards the conveyance of

(*u*) 2 Saud. Uses, p. 60.
(*x*) 2 Bl. Com. 339.
(*y*) Sand. ubi sup.
(*z*) Vide sup. p. 368.
(*a*) Sugd. Gilb. 229 (n.). By 4 & 5 Vict. c. 21, a release made under that Act had the same effect as a lease and release. This Act was repealed by 37 & 38 Vict. c. 96, the use both of a lease and release, and of a statutory release, having been in practice discontinued.

"the immediate freehold thereof, be deemed to lie in grant "as well as in livery,"—all conveyances of hereditaments, (whether corporeal or incorporeal, whether in possession or in expectancy, and whether for an estate of freehold or for an inferior estate,) may now be brought within the range of that common law conveyance discussed in the last chapter under the head of grant; though, in its antient and proper application, that conveyance was confined (as we have seen) to the transfer of incorporeal hereditaments and estates in expectancy: and this being the case, a grant has, in fact, supplanted, generally speaking, all these methods, and become the almost universal expedient for conveying real estate *inter vivos*. It is to be observed, however, that it is the practice of conveyancers to import into a grant of corporeal hereditaments, limitations to uses, and that a conveyance so framed (when the use is not limited to the grantee) takes effect under the Statute of Uses; for while the seisin to the use is created by force of the statute 8 & 9 Vict. c. 106, the use is converted into the legal estate by force of 27 Hen. VIII. c. 10 (*b*). And the operation is the same of a conveyance under the Conveyancing Act, 1881, which has made the use of the word "grant" unnecessary (*c*).

Having thus considered each of the different conveyances under the Statute of Uses, it is now time to make some remarks applicable to those conveyances as a *class*.

We may remark then, in the first place, that conveyances to uses must of course comprise all the circumstances necessary to bring the Statute of Uses into operation. Some use, therefore (either *in esse* or otherwise), must be raised by them, and some sufficient seisin to such use must

It may be as well to remark, that there may also be a grant of land containing *no* use; as if A. grant land directly to B. and his heirs. In such a case the conveyance takes effect, not under the Statute of Uses, but as a common law grant extended in its operative power by force of 8 & 9 Vict. c. 106, as already explained, sup. p. 513.

(*c*) 44 & 45 Vict. c. 41, s. 49.

be constituted (*d*); or, in the language of conveyancers, there must be a seisin proper to support or *serve* the use (*e*). And from this necessity of a seisin to a use it follows, that an existing term of years cannot be transferred by any method of conveyance depending on the Statute of Uses for its operation; for of a mere chattel interest there can be no seisin: though, on the other hand, the owner of the freehold may (as we have seen) convey it by these methods, for a term of years; for he has a seisin out of which the use for the term may be served (*f*). For the same reason it has also been supposed that a corporation aggregate cannot aliene land by a conveyance under the Statute of Uses (*g*); for, as formerly remarked, it was part of the antient doctrine with respect to uses, that such bodies as these could not be seised to any use but their own (*h*). When corporations aggregate, therefore, have had occasion to make conveyances of their lands, the method adopted has commonly been that of a feoffment; or a lease with actual entry, followed by a release (*i*).

With respect, however, to the use which is required for the purpose of a conveyance under the statute, this may either be expressly declared or implied by law. Thus, if A. convey by feoffment or lease and release to B. in fee, without consideration, and without declaring any use, there will be a *resulting* use, by construction of law, to himself the grantor; and such use the statute will execute accordingly (*j*).

With respect to the limitation of estates by these methods of conveyance, it may be laid down as a general proposition, that a limitation of the legal estate by way of use, is governed by the same principles as apply to the

(*d*) Vide sup. p. 368.

(*e*) 2 Sand. Uses, p. 59; 1 Sand. Uses, pp. 97, 133, 140.

(*f*) 2 Sand. Uses, p. 59.

(*g*) Ib. p. 58; 4 Cru. Dig. 175; Sugd. Gilb. 7, (n.).

(*h*) Vide sup. p. 362.

(*i*) 2 Sand. Uses, p. 59; Sugd. Gilb. 7, n. (1).

(*j*) Co. Litt. 271 b; 1 Sand. Uses, pp. 106, 109; Doe *v.* Rolfe, 3 Nev. & Per. 648. Vide sup. p. 361.

creation of estates by a common law assurance (*k*). Thus we have seen that the word *heirs* is necessary, at common law, to create an estate of inheritance (*l*); and in like manner if a man bargains and sells to A., without adding *and his heirs*, A. has only an estate for life (*m*). So an estate may be limited by way of use (as well as in a common law conveyance) in possession, in remainder, or in reversion (*n*); and, if in remainder, must be limited to take effect in possession immediately on the determination of the particular estate (*o*). So the remainder may be either vested or contingent (*p*); and is subject (if contingent) to the common law rule, that if it amount to freehold, it cannot be limited on a particular estate less than freehold (*q*). Legal estates created by way of use are also subject, in general, to the same incidents as if created by the methods of the common law (*r*). Thus, where a particular estate was limited by way of use, it was formerly liable to forfeiture if the tenant made a feoffment for a larger estate than his interest warranted; and if a contingent remainder was limited by way of use, and the particular estate was destroyed before the contingency happened, the remainder was defeated (*s*). We have seen, however, that in both of these cases, the former law has now become affected by modern provisions (*t*).

But while a limitation by way of use, is thus in general subject to common law principles, there are some very material particulars, in which it has always been allowed

(*k*) 1 Sand. Uses, pp. 123, 124; Corbet's case, 1 Rep. 87 b. A more liberal construction, however, is in some cases allowed in a limitation to uses, than in a common law conveyance; vide sup. pp. 521, n., 530, n.

(*l*) Vide sup. p. 237; 2 Bl. Com. 109; Nevell *v.* Nevell, 1 Roll. Ab. 837.

(*m*) 1 Sand. Us. p. 124.

(*n*) Sugd. Gilb. lvii. lviii.

(*o*) Sugd. Gilb. ib. 164; vide sup. p. 331.

(*p*) Sugd. Gilb. lviii. 153.

(*q*) Ib. 164, 165; vide sup. p. 328.

(*r*) 1 Sand. Uses, p. 166.

(*s*) Sugd. Gilb. p. 298.

(*t*) Vide sup. p. 333.

a greater latitude (*u*). The nature of these may be explained as follows.

1. By the common law, a man could not in any case be a purchaser, (that is, take an estate,) by his own conveyance; for he could not in the nature of things, unite the opposite capacities of grantor and grantee (*x*). Thus A., seised in fee, could not convey to himself for life, remainder over to B. in fee; nor to B. for life, remainder to himself, the grantor, in fee. In the first case, the whole conveyance would be void; in the second, the remainder: A. in such case taking no remainder, but continuing in the *reversion*, as of his former estate (*y*). And the distinction involved this practical difference, that the reversion being the old estate, was in its descent confined to the blood of the same purchaser as before; whereas if A. had taken (or in other words purchased) it as a remainder, it would (according to the general law of inheritance) have been descendible to his heirs general, whether his former title had been by purchase or descent (*z*). But indirectly, and through the medium of a limitation to uses, it has been always to a certain extent practicable for a man to become a purchaser of his own estate (*a*). Thus A. may by feoffment, or lease and release, convey to a third person, C., to the use of himself, the grantor, for life, with remainder to the use of B., in tail or in fee; or to the use of B. for life, with remainder to the use of himself,

(*u*) 1 Sand. Uses, p. 130.

(*x*) Per Hale, Pibus *v.* Mitford, 1 Vent. 378; Southcot *v.* Stowell, 2 Mod. 210; 1 Sand. Us. 131, 132; "*Nemo potest esse agens et patiens*," 2 Prest. Est. 20. As to *personal* property, (including *chattels real*,) a modern statute has made the following provision, viz., that any person shall have power to assign personal property now by law assignable, (including chattels real,) directly to himself and another person or other persons or corporations, by the like means as he might assign the same to another. (22 & 23 Vict. c. 35, s. 21.)

(*y*) See Co. Litt. 22 b; Read *v.* Errington, Cro. Eliz. 321; 2 Bl. Com. 176, et sup. pp. 314 et seq.

(*z*) 2 Bl. Com. 176; Watk. Desc. 169; vide sup. p. 399.

(*a*) Per Hale, Pibus *v.* Mitford, 1 Vent. 378; Southcot *v.* Stowell, 2 Mod. 210; Watk. Desc. 180.

the grantor, in tail; and in all these cases he will take the legal estate by purchase accordingly (*b*). Yet if the remainder were to the use of himself in *fee*, he would not at one time have taken by purchase; at least not in such a sense as to make him a purchasing ancestor. For such a use was considered as amounting only to the *old use in reversion*, so that it would be converted by the statute into a legal estate in *reversion*, which would descend to the blood of the same purchaser as before (*c*). And such was the state of the law at the time of passing the Inheritance Act (3 & 4 Will. IV. c. 106); but that Act (in its third section) established a new rule with respect to the limitation which a man makes in his own favour, in his own conveyance; the terms of the provision being as follows:—"that when any land (*d*) shall have been "limited by any assurance, executed after the 31st De- "cember, 1833, to the person or to the heirs (*e*) of the "person who shall thereby have conveyed the same land, "such person shall be considered to have acquired the

(*b*) Co. Litt. ubi sup.; Co. Litt. by Harg. 13 a, n. (2). 1 Sand. Uses, p. 135; Sugd. Gilb. pp. 150, 151.

(*c*) 1 Rep. 129 b, 130 a; Co. Litt. 23 a; Reed *v.* Errington, Cro. Eliz. 321; Lord Raym. 862; Godolphin *v.* Abingdon, 2 Atk. 57. The case was the same where the use in fee *resulted* to the grantor, instead of being expressly limited. As to resulting uses, vide sup. p. 361.

(*d*) The word *land* is used in this Act in a sense much larger than properly belongs to it; and is to be understood to extend to all hereditaments, corporeal or incorporeal, freehold or copyhold; and every interest capable of being inherited, including chattels and other personal property, if transmissible to *heirs* (3 & 4 Will. 4, c. s. 1.)

(*e*) A limitation by a man to his own heirs, is equivalent to a limitation to himself and his heirs; "for," says Lord Coke, "*hæres est* "*pars antecessoris*. And this ap- "peareth in a common case, that "if land be given to a man and "his heirs, all his heirs are so "totally in him, as he may give "the land to whom he will."—Co. Litt. 22 b; and see 1 Vent. 378, 2 Bl. Com. 176. A limitation by a man to his own heirs was ly subject, before the Act, to the same rules as stated in the text with respect to a limitation by him to *himself* in fee, or to his own use in fee. (1 Rep. 129 b, 130 a; Co. Litt. ubi sup.)

"same as a *purchaser* by virtue of such assurance, and "shall not be considered as entitled thereto as of his former "estate, or part thereof." We may add here, that, upon the same principle which at common law made it impossible for a man to convey to himself, he could not convey to his wife; she being considered as the same person with him (*f*). Yet the object might be effected through the medium of a limitation to uses; that is, by creating a seisin in another person, and declaring a use to the wife (*g*). And now under the Conveyancing Act, 1881, a man may convey freeholds directly to himself jointly with another or others, and may also convey freeholds directly to his wife either alone or jointly with another or others (*h*).

2. At common law, a freehold could not be created to commence *in futuro*; or, in other words, be limited to take effect at a future period, except by way of remainder upon some particular estate also passing at the same time out of the grantor; for which rule, and the reasons on which it is founded, the reader is referred to a former part of the work (*i*). But this might be effectually done by a conveyance under the Statute of Uses: for a use was never subject to the like restriction, but may be limited for any extent of interest, to commence *in futuro* (*j*); and the statute, taking effect on such future interest, transmutes it into legal estate (*k*). Thus a man might covenant to stand seised in fee to the use of another (or to bargain and sell to him in fee) seven years hence, and such conveyance would be effectual (*l*). So by feoffment, or lease and release, an estate might have been conveyed to A. and his heirs to the use of B. and his heirs, at the death of C. (*m*). A use thus limited *in futuro*,

(*f*) Co. Litt. 112 a; Moyse *v.* Giles, 2 Vern. 385; Lucas *v.* Lucas, 1 Atk. 271; Arthur *v.* Bokenham, 11 Mod. 156.

(*g*) 1 Sand. Uses, p. 132.

(*h*) 44 & 45 Vict. c. 41, s. 50.

(*i*) Vide sup. pp. 320, 321; Sugd. Gilb. 163, (n.); 1 Sand. Uses, p. 138.

(*j*) Vide sup. p. 364.

(*k*) Sugd. Gilb. 161, (n.)

(*l*) 1 Sand. Uses, p. 139.

(*m*) Ib. 140.

independently of any preceding estate, is called a *springing* use (*n*). Such a use is also often described as *executory*, because it is not executed by the statute until it comes into *esse* by the arrival of the period contemplated. Thus, in the two first examples, the whole fee would remain in the covenantor or bargainor, till the seven years expired (*o*); in the two latter, a use resulted to the feoffor or releasor, till the death of C. (*p*). But on those events happening, the springing use would be executed, and the *cestui que use* become clothed with the legal estate in fee.

3. By a common law conveyance, an estate could not be limited, upon a future event, to one person, in abridgment or defeasance of an estate of freehold, first limited to another (*q*); which is often expressed, where the dispositions are both in fee simple, by the maxim that *a fee cannot be limited on a fee* (*r*). Thus land could not be conveyed to B. in fee, or for life, with a provision that when C. returned from Rome, it should thenceforth immediately go over to C. in fee (*s*). For this would be to defeat the first estate by force of a condition, which can only be done by the entry of the grantor, or his heirs; and the effect of such entry would be to destroy the second

(*n*) Sugd. Gilb. 153.

(*o*) Ib. 161, (n.), 153, (n.)

(*p*) 1 Sand. Uses, p. 140.

(*q*) Co. Litt. by Butl. 203 (b), n. (1); Cogan v. Cogan, Cro. Eliz. 360; Fearne, by Butl. pp. 14, 15, 18, 264.

(*r*) Fearne, by Butl. p. 372; 1 Sand. Uses, p. 143; 2 Bl. Com. 173, 164. This maxim applies not only to such limitations as referred to in the text, but also to limitations of one fee upon another by way of *remainder*. For no remainder (as we have seen) can be limited on a fee-simple (vide sup. p. 320). And therefore if land be given to A. and his heirs, so long as B. has heirs of (which is a fee-vide sup. p. 239), with remainder in fee to C., this remainder is void. (Fearne, by Butl. p. 372.) And the maxim, in this sense of it, applies to conveyances under the Statute of Uses, as well as those at common law. It is, however, to be recollected, that there may be *alternate* or *substituted* limitations of the fee, which each of them is by way of contingent remainder (vide sup. p. 326). See the maxim further discussed in the modern case of Egerton v. Massey, 3 C. B. (N. S.) 338.

(*s*) Fearne, by Butl. pp. 14, 15.

limitation as well as the first, and to restore the grantor and his heirs to their former estate (*t*). But a use might always be made to shift, in this manner, from one person to another (*u*); and therefore, since the statute, land may be conveyed through the medium of a use, in like manner; as by limiting it to A. and his heirs, to the use of B. and his heirs, with a proviso, that when C. returns from Rome, the land shall be to the use of C. and his heirs (*x*). A use so limited in derogation of a preceding estate, is called a *shifting* or *secondary* use (*y*); and this also is of the *executory* kind, the operation of the statute being suspended till the event arrives (*z*). Thus, in the example just given, there is a use first executed by the statute in B., and when C. returns from Rome, the use to C. comes into *esse*, and is executed in him (*a*). It is, however, to be observed, that upon questions of legal construction, a preference is always given to the modifications of the common law; wherefore, it is firmly settled, that no estate capable of being considered as a remainder (according to the rules by which remainders are limited) shall ever be construed as a shifting or springing use (*b*). But this maxim, so far as regards the present subject, must now be considered in reference to the following enactment, viz. that every contingent remainder created by any instrument executed after 2nd August, 1877, or by any will or codicil revived or republished by any will or codicil after that date, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder,

(*t*) Co. Litt. 379 a; Litt. ss. 721, 722, 723; 1 Sand. Uses, p. 151; vide sup. p. 300.

(*u*) Sugd. Gilb. 153, 154, (n.); 1 Sand. Uses, p. 152.

(*x*) 1 Sand. Uses, p. 149.

(*y*) Ib. 152; Sugd. Gilb. 152, (n.)

(*z*) Sugd. Gilb. 154, 155, (n.); 1 Sand. Uses, p. 144.

(*a*) This form of disposition is sometimes called a *conditional limitation*, a term, however, which is also used in a different sense. See Fearne, by Butl. (9th edit.) pp. 13, 15; Sugd. Gilb. 178, (n.); 1 Sand. Uses, p. 151.

(*b*) 2 Saund. by Wms. 388; Fearne, by Butl. 393, 9th edit.

shall, in the event of the prior particular estate of freehold, determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation (*c*).

4. The grantor, in a common law conveyance, could not reserve to himself, nor confer on any other person, the power of revoking or altering the grant, by any future act or instrument: for that was deemed repugnant to the conveyance itself (*d*). The utmost that the common law allowed, was a deed of defeasance (coeval with the grant, and therefore esteemed a part of it) upon events specifically mentioned (*e*). But the limitation of a *use*, subject to a power of this description, was not considered as involving any repugnancy; for a use was a mere direction to the trustee, how he was to deal with the legal estate; which might well be recalled or changed (*f*). Therefore, in a conveyance under the statute a proviso giving to the grantor, the grantee, or a stranger, authority to revoke or alter, by a subsequent act, the estate first granted, would be valid; for it is in effect no more than an authority to revoke the use first limited, or to declare a new one (*g*). Such provisoes are called *powers* (*h*); a term properly applicable, as we have seen, to *all* authorities, as distinguished from estates (*i*): and they are either mere *powers of revocation* (*k*), enabling the grantor simply to recall what he has bestowed; or *powers of revocation and new*

(*c*) 40 & 41 Vict. c. 33; vide sup. p. 333.

(*d*) Co. Litt. 237 a; 2 Bl. Com. 327, 335; 2 Fonb. 158, 159.

(*e*) 2 Bl. Com. 335; vide sup. p. 531.

(*f*) Sugd. Gilb. 158, (n.)

(*g*) Ibid.

(*h*) "The limitation and modifying of estates by virtue of powers, came from equity into the common law with the Statute of Uses."—(1 Burr. 120.)

(*i*) Vide sup. p. 229.

(*k*) A power of appointment implies power of revocation, but not *è converso*. (4 Cruise, Dig. 232.)

appointment (*l*), authorizing the grantor, or some other person, to alter or make a new disposition of the estate conveyed. The first will of course hardly find a place except in grants of a gratuitous nature, (or *voluntary* conveyances as they are called,) though in these they are naturally to be expected (*m*); mankind, according to the remark of Lord Bacon, having always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards (*n*). But with respect to powers of revocation and new appointment, they are of frequent occurrence in the more common case of conveyances founded on consideration, and particularly in family settlements; their object not being to indulge the caprice of any party, but to carry into effect with greater convenience the arrangements actually contemplated. Thus, if a life estate be limited to the settlor, with remainder over, it is common to insert a power enabling him from time to time to make effectual leases of the property in possession, for terms not exceeding twenty-one years; a privilege reasonable and convenient in itself, but such as is not incident to the estate of a tenant for life generally (*o*). Of the same nature, in general, are the usual powers of jointuring, selling, charging land with the payment of sums of money, and the like (*p*); and all these are technically described as powers of revocation and new appointment,—because, in authorizing a new disposition not made by the conveyance itself, they operate *pro tanto* as a revocation of those which it contains (*q*). Such

(*l*) 1 Sand. Uses, p. 155; 4 Cruise, Dig. 228.

(*m*) 2 Fonb. 155, n. (*q*).

(*n*) Bl. Com. ubi sup.

(*o*) It is to be remembered here, that under 40 & 41 Vict. c. 18 (as under the previous Acts as to settled estates), such leases may now be made by a tenant for life under a settlement even *without* a power to that effect in the settlement, provided it contains no express declaration to the contrary; and subject to such other exceptions and provisions as are contained in the statute; (vide sup. p. 252).

(*p*) 2 Sand. Uses, p. 81.

(*q*) 1 Sand. Uses, p. 155; 4 Cruise, Dig. 228. The term *power of revocation and new appointment* is not, however, usually applied to a mere power of leasing, jointuring, or the

a power, if closely considered, will be found to amount to an authority to create a use, to take effect in derogation, to a certain extent, of the uses first limited; or rather to the virtual limitation of an *executory* use of that description, in favour of such person, and for such estate, as shall be defined by the subsequent act of the donee of the power (*r*). This subsequent act or exercise of the power is called an *appointment* (*s*); and its effect (when it correctly pursues the authority) is to raise, in favour of the appointee, a use corresponding to the estate appointed (*t*);

like; but to powers of a different nature, as where a man conveys his estate to trustees to certain uses, with a proviso that it shall be lawful for him at any future time to revoke these uses and to declare new ones, &c.

(*r*) Sugd. Gilb. 152, 153 (n.); 2 Sand. Uses, p. 81.

(*s*) Sand. ubi sup. It is to be noticed that in whatever mode the power is exercised (whether by conveyance *inter vivos* or otherwise), the instrument in every case operates strictly as an appointment or declaration of the use, and the appointee takes the legal estate, and if any ulterior use is declared, it operates merely as a trust in equity. (See Sugden on Powers, p. 457.)

(*t*) As to the manner of executing a power to appoint by *will*, see 7 Will. 4 & 1 Vict. c. 26, ss. 10, 27, (post, p. 603, *in notis*); as to *illusory* appointments, 11 Geo. 4 & 1 Will. 4, c. 46; as to leases made under powers, 13 & 14 Vict. c. 17; as to defective execution of powers, 22 & 23 Vict. c. 35, s. 12. By the provision last mentioned, any deed executed after 13th August, 1859, in the presence of, and attested by two or more witnesses, in the manner in which deeds are *ordinarily* executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or by any instrument in writing *not testamentary*, notwithstanding it shall have been expressly required that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution, attestation or solemnity. Independently of this enactment, relief against a defective execution of powers has been also sometimes afforded in equity, but in favour only of a limited class of persons. (See Lucena *v.* Lucena, 5 Beav. 249; Garth *v.* Townsend, Law Rep., 7 Eq. Ca. 220.) Notice may be taken here, also, of a recent statute, under which no appointment made after the passing of the act shall be invalid on the ground that whereas the power was to appoint amongst several objects, the appointment does not include the whole of them. (37 & 38 Vict. c. 37.)

which being served out of the original seisin, is immediately executed by the statute, and transmuted into the equivalent legal estate (*u*). An appointment is not considered as an independent conveyance (*x*). It is merely ancillary to the former deed; which (as already observed) contains, in effect, a prospective limitation of the new use. The appointee, therefore, is considered, for most purposes, as deriving his title under the original conveyance; and to be in the same position as if that instrument had actually contained a limitation in his favour, to the extent of the estate appointed

Not only as to the limitation of estates, but in other particulars, there are differences between conveyances to uses, and those at common law. For most purposes (as we have seen) an actual possession is deemed to be given, by the former conveyances, equivalent to that which would have been obtained if the alienee (supposing the interest conferred to be freehold) had received livery of seisin, or (supposing it leasehold) had made actual entry after the demise (*z*). But as a bargain and sale, a covenant to stand seised, and a lease and release under the statute, conveyed the possession by construction of law only, so they differed from a feoffment, in such incidents as result from delivery of possession in point of fact. Therefore, though a feoffment, when made by the tenant in actual possession, used to pass a wrongful estate of freehold (supposing his title insufficient to give a rightful one), and, when made by a particular tenant for a greater estate than he could lawfully convey, occasioned a forfeiture (or, in the case of a tenant in tail, a discontinuance) of the particular estate, and the contingent remainders dependent on that estate were consequently liable to be defeated (*a*),

(*u*) 2 Sand. Uses, p. 82; 4 Cruise, Dig. 228.

2 Sand. Uses, p. 84.

See 4 Cruise, Dig. 282, 497; Bringloe *v.* Goodson, 4 Bing. N. C. 734; Sugd. on Powers, p. 470.

(*z*) 2 Sand. Uses, p. 52.

(*a*) Vide sup. p. 315.

—no such results followed from any conveyance by way of covenant to stand seised, bargain and sale, or lease and release under the statute (*b*). For by the feoffment, there was an actual investiture of the possession, as for an estate of freehold; which, it was held, must take effect either *de jure* or *de facto;* but the other conveyances could, in their nature, pass no more than the grantor might lawfully transfer (*c*). For this reason they received, by way of distinction from a feoffment, (and some others now abolished,) the appellation of *innocent* conveyances (*d*). But the statute 8 & 9 Vict. c. 106, s. 4, having (as we have seen) provided, that a feoffment made after the 1st October, 1845, shall not have any tortious operation, the whole learning on the subject to which we have here referred, (so far as regards conveyances executed after that date,) has, by the effect of this provision, been swept away.

The reader who reflects attentively on the nature of a conveyance under the Statute of Uses, as we have attempted to explain it in the present chapter, will not fail to be impressed with the importance of the changes which this act of parliament incidentally occasioned. It has been said to have had little other effect than to make a slight alteration in the formal words of a conveyance,—a remark alluding to the practice it introduced of limiting one use upon another, when the intention is to give a trust estate (*e*). So far indeed as the creation of that species of interest is concerned, such, and such only, was its result, but the remark puts altogether out of sight its operation in regard to the legal estate. We have seen that it enabled the

(*b*) 2 Sand. Uses, p. 73.

(*c*) Fearne, by Butler, p. 322; Smith *v.* Clyfford, 1 T. R. 744.

(*d*) Fearne, by Butler, p. 322; in Smith *v.* Clyfford, 1 T. R. 744, they are termed *lawful* conveyances. The same property of passing no estate beyond what the grantor may properly transfer belongs also to a *grant* at common law. (Co. Litt. 332 a; 2 Sand. Uses, p. 49.)

(*e*) 2 Bl. Com. 336.

owner to dispose of this, in methods obviously more suitable to the exigencies of social life than the conveyances formerly employed, and exempt from the harsh and inconvenient effects with which these were sometimes attended; and (what is of still greater consequence) that it materially enlarged the power of alienation itself, by affording the owner the means of subjecting his property to a variety of arrangements of which it was before incapable.

In thus affording escape, however, from the rigours of the antient law, the statute would have opened the door (unless closely watched) to inconveniences of a different description. For it would have enabled owners of land, through the medium of springing and shifting uses, and powers of revocation and new appointment, to prescribe the course in which their property should devolve, and prevent its effectual alienation, for any period of time however extended; and therefore to curb this licence, it was found necessary to establish a rigid rule of restriction. In order to explain this, we shall be led into some examination, before we close the chapter, of a subject which now for the first time presents itself, viz. that of *perpetuity* (*f*). In settlements (by which we here mean conveyances by way of provision for a family, whether made in consideration of marriage or otherwise), grantors have always been naturally prone to regulate the succession to an estate at very distant periods:—the earliest known arrangement of this nature having been the creation of an estate tail; which once operated as a sure and perpetual settlement of the property, in the line of the first donee, for the remotest generations. But as all such arrangements, while they continue in force, however long that period may be, tie

(*f*) On the subject of perpetuity, see Co. Litt. by Butler, 379 b, 327 a; 1 Sugd. Pow. 491, edit. 1836; 1 Pow. Dev. 388; Hist. Eng. Law, by Reeves, vol. iii. p. 324; 1 Smith's Leading Cases, 183; Cadell *v.* Palmer, 10 Bing. 140; Tollemache *v.* Lord Coventry, 8 Bligh, N. S. 547; Monypenny *v.* Dering, 16 Mee. & W. 418.

up the property, (as it is commonly expressed,) or in other words prevent its free alienation; they have been considered in later times with reasonable jealousy and dislike, as tending to embarrass the transactions of mankind, and to frustrate the purposes for which property was first established (*g*). To these feelings was doubtless in some measure attributable (*h*) the doctrine established by Taltarum's case, in the reign of Edward the fourth, by which a common recovery was allowed to have the effect of unfettering an estate tail (*i*); and in the same spirit, when limitations by way of springing and shifting uses, and powers of revocation and new appointment, came into practice, the courts soon began to contemplate with alarm the restrictive tendency of these devices. It was thought necessary, therefore, to fix upon some period as the latest at which an estate limited by way of executory use should be allowed to vest. Such a period has been accordingly established by a series of judicial decisions; and it is one derived from the state of the law applicable to entails. Even upon the most permanent plan, that of strict settlement, to which we adverted in a former place, the estate entailed could not, after the doctrine established by Taltarum's case, be preserved from alienation longer than during the life of the taker of the first estate of freehold, and the nonage of the tenant in tail next in remainder; for on attaining the age of twenty-one, the latter was competent, with the concurrence of the former, to suffer a recovery (*k*). By analogy to this (*l*) it has become the rule that the latest period at which an estate limited by way of executory use can be allowed to vest, is (with one particular exception) the expiration of some life or lives in being, and twenty-one years afterwards (*m*); as if a man

See 2 Bl. Com. 173.

(*h*) See Taylor *v.* Horde, 1 Burr. 60; 5 Cruise, Dig. 328.

(*i*) See as to this case, 5 Cruise, Dig. 422, 423; et sup. p. 248.

(*k*) Vide sup. p. 331.

(*l*) Co. Litt. by Harg. 20 a; note (5).

(*m*) 2 Bl. Com. 174; Long *v.* Blackall, 7 T. R. 100; Cadell *v.*

be seised in fee of lands, and gives them to the first son of J. S. that shall attain the age of twenty-one, and his heirs, —here the estate vests, at the latest, on the expiration of J. S.'s life and the infancy of such son; and this infancy, generally speaking, cannot expire later than twenty-one years after J. S.'s death; but if the son is born *posthumously* (which brings the case within the exception above alluded to) it will expire later by the addition of the time of gestation *in utero* which follows upon such death (*n*). On the other hand, however, in the case when the period at which the estate is limited to vest comprises no life or lives in being, it is not allowed to exceed twenty-one years from the time when the limitation is created (*o*).

Such being the rule, in these different cases respectively, as to the latest period at which an estate by way of executory use is allowed to vest,—we have now to add that it has been long established as a general principle, and one not applicable to executory uses only, that the law abhors a perpetuity (*p*); that is (according to the usual meaning of the term) any limitation, either for a legal or for an equitable interest, by way of executory use, or otherwise, of such a nature as to lead to the possibility, if it were allowed, of making a future estate vest at a later period than is warranted by such rule; and that it uniformly annuls every such limitation (*q*). Nor is this principle

Palmer, 10 Bing. 140; S. C. 7 Bligh, N. S. 202; Gilbertson *v.* Richards, 5 H. & N. 453.

(*n*) 2 Bl. Com. 174. See also Long *v.* Blackall, 7 T. R. 100; Wilkinson *v.* South, ibid. 558; Cadell *v.* Palmer, 10 Bing. 140; S. C., 7 Bligh, N. S. 202; Stuart *v.* Cockerell, Law Rep., 7 Eq. Ca. 363.

(*o*) Palmer *v.* Holford, 4 Russ. 403; 1 Jarman on Wills, p. 205.

(*p*) Bl. Com. ubi sup. It is said in 10 Rep. 113 b, that "perpetui-" ties, monopolies, and patents of "concealment, were born under an "unfortunate constellation; for as "soon as they have been brought "in question, judgment has always "been given against them, and "none at any time given for "them."

(*q*) Long *v.* Blackall, ubi sup.; Doe *v.* Ewart, 7 Ad. & Ell. 648; Cadell *v.* Palmer, ubi sup.; Gilbertson *v.* Richards, 5 H. & N. 453. It has been doubtful whether the doctrine which annuls a limitation on the ground of its tending

confined to dispositions of the freehold. It applies also to terms of years and to personal property (*r*). And by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10, it has been recently enacted, with regard to instruments coming into operation on or after the 1st January, 1883, that an executory interest to take effect in default of issue, or on failure of the issue, of the tenant of the executed estate, shall become void so soon as any of such issue attains the age of twenty-one years.

In connection with the subject of the rule against perpetuity, we may notice here the state of the law with respect to the accumulation of the income of property, whether real or personal, even when the period allowed by that rule is not exceeded. A remarkable instance having occurred, in which, to secure an immense fortune to his distant descendants, a testator had recourse to the expedient of directing the income of his property to be accumulated during the lives of all his children, grandchildren and great-grandchildren, who were living at the time of his death, for the benefit of some future descendants to be living at the death of the survivor (thus keeping within the rule as to executory interests above laid down); it was thought expedient to put a check, for the future, on dispositions of this description (*s*). It was consequently

to a perpetuity, applies to *remainders*. Fearne, by Butler, p. 502, is as follows: "If lands be limited "to a person *in esse*, with re- "mainder after his decease to his "unborn children, and afterwards "to the children of such unborn "children, this last remainder is "absolutely void." (See also Challis *v.* Doe *d.* Evans, 18 Q. B. 231, and Cattlin *v.* Brown, 11 Hare, 375.) And although the opinion which now obtains is, that the rule limiting the creation of contingent remainders to a single unborn life and making void such limitations to a double unborn life is essentially different from the rule of perpetuities, still there is a common principle at the bottom of each rule, and the two rules have also the same common object.

(*r*) See Fearne, Cont. Rem. pp. 320, 371; Atkinson *v.* Hutchinson, 3 P. Wms. 262.

(*s*) This was the case of Mr. Thellusson's will, as to which see Fearne, by Butler, p. 436, (n.) The property is said to have consisted of landed estates of about £4,000 a year, and

provided by act of parliament (39 & 40 Geo. III. c. 98), that no such accumulation shall be allowed for a longer term than the life of the grantor, *or* twenty-one years from the death of the grantor or testator, *or* during the minority of any person living or in *ventre sa mère* at the death of such grantor or testator, *or* during the minority only of any person who, under the uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated: and, further, that where any accumulation is directed contrary to the Act, such direction shall be void, and the income during the time the property is directed to accumulate contrary to the Act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed (*t*). But the Act does not extend to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of wood or timber (*u*).

personalty of above half a million; and the probable amount of the accumulated fund was estimated at above £19,000,000.

(*t*) On the construction of this part of the statute, see the authorities cited in 1 Smith's Leading Cases, p. 186. See also the following among other recent cases: Curtis *v.* Lukin, 5 Beav. 147; Boughton *v.* James, 1 Coll. 26; Scarisbrick *v.* Skelmersdale, 17 Sim. 187; Williams *v.* Lewis, *in Dom. Proc.*, 28 L. J. (Ch.) 505; Macpherson *v.* Stewart, ib. 177; Simmons *v.* Pitt, Law Rep., 8 Ch. App. 978.

(*u*) As to these exceptions, see Halford *v.* Stains, 16 Sim. 488; Edwards *v.* Tuck, 3 De Gex, M. & G. 40; Drewett *v.* Pollard, 27 Beav. 196; Clulow's Trusts, 28 L. J. (Ch.) 696; Varlo *v.* Faden, 29 L. J. (Ch) 230; Matthews *v.* Keble, Law Rep., 3 Ch. App. 691.

CHAPTER

OF CONVEYANCES BY TENANTS IN TAIL, AND MARRIED WOMEN.

THE ordinary conveyances at common law, and also those under the Statute of Uses, are capable of being applied to transfer the interests of tenants in tail and of married women: but as they are not effectual for these purposes, except by virtue of certain acts of parliament distinct from the Statute of Uses, nor without observing the solemnities which those Acts prescribe,—they may therefore properly be considered, when applied to either of these purposes, as constituting a separate class of conveyances by force of the statute law.

Though a tenant in tail has an estate of inheritance, yet by none of the conveyances hitherto examined, if in their simple form, that is, unaccompanied with the solemnities above referred to, can an indefeasible interest be granted by him beyond the period of his own life—except with regard to leases for terms not exceeding *twenty-one years*, and this only under certain limitations and qualifications which have been noticed in a former place (*a*): for whatever estate he grants, must either determine with his life, or at least is liable to be defeated, after his decease, by his issue, or in default of issue, by the remainderman or reversioner. And again, a married woman, or (as she is technically called) a *feme covert*, is not capable by any of these conveyances, in their simple form (*b*), to make alienation of her lands and tenements (except as regards her interest

(*a*) Vide sup. p. 252.

(*b*) 2 Bl. Com. 292.

in property settled to her separate use), for any estate whatever, or to subject them to any charge (*c*).

These incapacities result indeed, in the two cases, from very different causes. That of the tenant in tail is by the effect of the Statute *de Donis*, passed to protect the interest of those in succession and expectancy, in the case where land is given to a man and the heirs of his body (*d*); but the incompetency of the feme covert is a personal one, and is imposed upon her by the common law (with other similar disabilities) in consequence of her being subject to the control of her husband, and presumably deprived of her freedom of agency. In both cases, however, notwithstanding the general rule of restriction, the law has long allowed a more ample power of alienation to be exercised through the medium of particular methods of assurance; in former times by *fines* and *recoveries*, which were altogether of a special nature, and now by any of the ordinary conveyances already examined, with the accompaniment only of certain forms or solemnities of a special kind. The mode of alienation, as regards tenant in tail and married women respectively, may be considered therefore as naturally forming one entire or consolidated subject, and has in fact been so treated by the legislature.

This branch of law is chiefly regulated by the 3 & 4 Will. IV. c. 74, the statute for abolishing Fines and Recoveries: by the provisions of which, a tenant in tail is empowered, in such methods as therein mentioned, to *bar* the estate tail (as it is commonly expressed), that is, to grant the land entailed as a fee simple absolute (or for any less estate), indefeasible by his issue, or by any ulterior claimants. And a married woman may also, by such means

The restriction on a feme covert's power of alienation, does not extend, however, to the case where she conveys in execution of a mere *power* or *authority;* or in performance of a *condition*, as where land is vested in her on condition to convey to others. And such acts as these may be done by her without the concurrence of her husband. Co. Litt. by Harg. 112, n. (6).

(*d*) 13 Edw. 1, c. 1; vide sup. p. 242.

as are specified in the same Act, dispose, with her husband's concurrence, of any estate which she alone, or he in her right, may have, as fully and effectually as if she were a feme sole (*e*). The modes of proceeding to be adopted for these purposes are (as already stated) new, and by way of substitution for the antient methods of fine and recovery (*f*); which being now abolished, and of a character besides peculiarly abstruse and uninviting, we would gladly pass by without further notice. The learning, however, which they involve, is still so material to the history of existing titles, and even to the correct apprehension of the present system, that they cannot with propriety be left unexamined; and before we attempt to give any further account of the substituted methods, the nature of a fine, and also of a recovery, shall first be explained.

Both of these were of the class of conveyances by matter of record; and both consisted of fictitious suits in the Court of Common Pleas at Westminster, in which the intended alienee was supposed to recover the estate by process of law. In their origin, indeed, they were actual suits commenced at law for the recovery of the possession of land; but being found competent to confer a title, in cases where the ordinary conveyances would not suffice, they were at length adopted as mere means of transfer between persons not really standing in the relation of adverse litigants (*g*). It will be necessary, however, to consider them successively and in detail.

And, first, of *Fines*.

[Fines were so called, because they put an end, not only to the suit then commenced, but also to all other suits and controversies concerning the same matter (*h*).

(*e*) 3 & 4 Will. 4, c. 74, s. 77.

(*f*) Sect. 2.

(*g*) 2 Bl. Com. 349, 357. See 2 Roll. Abr. 13, where it is said, "*Non in regno Angliæ provideatur vel sit aliqua securitas major seu solennior per quam aliquis vel aliqua statum certiorem habere possit,*

[They are assurances of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton, in the reigns of Henry the second and Henry the third, as things then well known and long established (*i*); and instances are produced of them even prior to the Norman invasion (*k*). So that the Statute 18 Edw. I., called *Modus levandi Fines*, did not give them original, but only declared and regulated the manner in which they should be levied or carried on.] And that was as follows:

1. The party to whom the land was to be conveyed, or assured, commenced an *action* or *suit* at law against the intended vendor, (generally an action of covenant,) by suing out a writ denominated, from its initial words, a writ of *præcipe quod teneat conventionem* (*l*); the foundation of which was a supposed agreement or covenant that the defendant should convey the lands to the plaintiff: on the breach of which agreement the action was brought. On this writ, there was due to the crown, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one tenth of the annual value (*m*). The suit being thus commenced, then followed, 2. The *licentia concordandi*, or leave to agree the suit (*n*). For as soon as the action was brought, the defendant, knowing himself to be in the wrong, was supposed to make overtures of peace and accommodation to the plaintiff, by whom they

vel ad statum suum verificandum aliquod solemnius testimonium producere, quam finem in curiâ domini regis levatum; qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet; et hâc de causâ providebatur."

(*i*) Glan. l. 8, c. 1; Br. l. 5, t. 5, c. 28, s. 7.

(*k*) Plowd. 369.

(*l*) A fine might also be levied on a "writ of *mesne*," of *warrantia* or *de consuetudinibus et servitiis*. (Finch, L. 278.)

(*m*) 2 Inst. 511.

(*n*) It seems doubtful whether this is the true principle on which the licence was required; for it is said that, in the times of strict feudal jurisdiction, if a vassal had commenced a suit in the lord's court, he could not abandon it without leave; lest the lord should be deprived of his perquisites for deciding the cause. (Robertson, Hist. of Charles V., Sect. I.)

were accordingly accepted; but having, upon suing out the writ, given pledges to prosecute his suit, which he endangered, if he now deserted it without licence, he therefore applied to the court for leave to make the matter up. This leave was readily granted; but, for it, there was also another fine due to the king, called the *king's silver*, or sometimes the *post fine* with respect to the *primer fine* before mentioned. And it was as much as the primer fine and half as much more, or 10*s.* for every five marks of land; that is, three-twentieths of the supposed annual value (*o*). 3. Next came the *concord*, or agreement itself, after leave obtained from the court; and this was usually an acknowledgment from the deforciants (or those who kept the other out of possession), that the lands in question were the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine was called the *cognizor*, and he to whom it was levied the *cognizee*. The acknowledgment was to be made in the Court of Common Pleas—either openly, in the court, or else before one of its judges, or (in the country) before two or more commissioners empowered by a special authority, called a writ of *dedimus potestatem;* and these judges and commissioners were required by statute 18 Edw. I., to take care that the cognizors were of full age, sound memory, and out of prison. And if there were any feme covert among the cognizors, she was privately examined, whether she did it willingly and freely, or by compulsion of her husband. By these acts, all the essential parts of a fine were completed; and if the cognizor died the next moment after the fine was acknowledged, provided it were subsequent to the day on which the writ was made returnable, still the fine was to be carried on in all its remaining parts (*p*). Of these the next was, 4. The *note* of the fine, which was only an abstract of the writ of covenant, and of the concord; naming the parties, the

(*o*) 5 Rep. 39; 2 Inst. 511; stat. 32 Geo. 2, c. 14.

(*p*) Price *v.* Davies, Comb. 71.

parcels of land, and the agreement: and, by direction of the statute 5 Hen. IV. c. 14, this was to be enrolled of record in the proper office. 5. The fifth and last part was the *foot* of the fine, or conclusion of it: which included the whole matter; and recited the parties, and the day, year, and place when, where and before whom it was acknowledged or levied. Of this conclusion, there were indentures made and engrossed at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus: "*Hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceedings at length. And thus the fine was completely levied at common law.

To render the fine more universally public, and less liable to be levied by fraud or covin, it was directed by 4 Hen. VII. c. 24 (in confirmation of a previous statute), that a fine, after engrossing, should be openly and solemnly read and *proclaimed* in court (during which all pleas should cease), sixteen times; viz., four times in the term in which it was made, and four times in each of the three succeeding terms; and these proclamations were indorsed on the back of the record (*q*).

Fines thus levied were of four kinds:—1. What in our law French was called a fine *sur cognizance de droit come ceo que il ad de son don*; that is, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This was the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant of conveying to the plaintiff the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledged in court a former

(*q*) The number of proclamations required were, by 31 Eliz. c. 2, reduced to one in each of the three terms. We may here observe, that in order to avoid the trouble and expense of procuring evidence that they were actually made, it was declared by 11 & 12 Vict. c. 70, that all fines theretofore levied in the Court of Common Pleas should be *deemed* to have been levied with proclamations.

feoffment to have been made by him to the plaintiff. This fine was therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual delivery: so that this assurance was rather a confession of a former conveyance, than a conveyance then originally made; for the deforciant or cognizor acknowledged the right to be in the plaintiff, or cognizee, as that which he had *de son don*, of the proper gift of himself, the cognizor. 2. A fine *sur cognizance de droit tantum*, or upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This was commonly used to pass a *reversionary* interest which was in the cognizor. For of such reversions there could be no feoffment supposed, as the possession during the particular estate belonged to a third person (*r*). It was worded in this manner, "that the cognizor acknowledges the right "to be in the cognizee, and grants for himself and his "heirs, that the reversion, after the particular estate "determines, shall go to the cognizee" (*s*). 3. A fine *sur concessit* was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this might be done, reserving a rent or the like, for it operated as a new grant (*t*). 4. A fine *sur don grant et render* was a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.* and the fine *sur concessit*, and might be used to create particular limitations of estate; whereas the fine *sur cognizance de droit come ceo, &c.*, conveyed nothing but an absolute estate, either of inheritance, or at least of freehold (*u*). In this last species of fine, the cognizee, after the right was acknowledged to be in him, granted back again, or rendered to the cognizor, or per-

(*r*) Danver's case, Moore, 629.

(*s*) West. Symb. p. 2, s. 95.

(*t*) Ib. s. 66. This was commonly used for the creation of smaller estates, as for life or years, though it might be also used to convey the fee simple. (Burt. Compend. 24.)

(*u*) Hunt *v.* Bourne, Salk. 340.

haps to a stranger, some other estate in the premises. But, in general, the first species of fine *sur cognizance de droit come ceo, &c.* was the most used.

We are next to consider the force and effects of a fine, and these were principally as follows (*x*):

1. Like all other conveyances, it bound the *parties* thereto, and also all "*privies*," that is, persons deriving title under the parties; and this, whether levied with proclamations or not (*y*). But in an important respect, it had a force peculiar to itself; for if one of the parties thereto was a married woman (and consequently incapable to alieno by an ordinary conveyance), she would still be bound by the fine; and (supposing her husband to concur in it) it would effectually pass any estate, or bar any right of dower that she might have in the lands therein comprised (*z*). And this peculiarity was justified by the circumstance that the court would not allow a fine, affecting her interest, to pass without privately examining her as to her voluntary consent; which removed the general suspicion of compulsion by her husband (*a*).

2. A fine with *proclamations* bound not only parties and privies, but even *strangers* (that is, persons not parties or privies), if they failed to put in their claims within the time allowed by law; and if during all that period they were subject to no legal disability sufficient to excuse their acquiescence (*b*). It was in reference to this

(*x*) A fine had several other effects, the enumeration of which will be found in the First Real Property Report, p. 21; and see Co. Litt. by Harg. 121 a, n. (1).

(*y*) 2 Bl. Com. 355; see 5 Cruise, Dig. 133, 159, 202. It did not, however, unless levied with proclamations, bar the issue in tail of their right to bring an action of formedon. (Hunt *v.* Bourne, Salk. 340; Doe *d.* Thomas *v.* Jones, 1 Tyrw. 517.)

(*z*) 5 Cruise, Dig. 82, 154, 156.

(*a*) Bl. Com. ubi sup.; Cruise, ubi sup. This was by the statute 18 Edw. 1, *De modo levandi fines.*

(*b*) 2 Bl. Com. 354. There were antiently four methods of claiming so as to avoid being concluded by a fine: 1. By action; 2. By entering such claim on the record at the foot of the fine; 3. By entry on the land; 4. By continual claim. But the second of these was not in force after the statute of Henry 7. The

property of a fine, (which belonged to it from the remotest period of legal history,) that rights are said in our books to be barred *by fine* and *non-claim* (*c*). The doctrine, indeed, was once abolished by a statute made in 34 Edw. III. c. 16, which admitted persons to claim and falsify the fine at any indefinite distance of time (*d*). But by 1 Richard III. c. 7, and 4 Hen. VII. c. 24, the bar was again restored, though the time of claim was extended (*e*); and after the latter statute, and until the modern abolition of these assurances altogether, the state of the law was as follows,—that by a fine, when duly *proclaimed*, the right of all strangers whatever was bound, unless they made claim by way of action, or lawful entry (not within one year and a day, as at the common law, but) within five years after proclamation made (*f*); but femes covert, infants, prisoners, persons beyond the seas, and such as were not of sane mind, had a further space of five years allowed to them and their heirs after the death of their husbands, or their attaining full age, recovering their liberty, returning to England, or being restored to their right mind (*g*). By the statute 4 Anne, c. 16, it was also provided, in cases where the claim was made *by entry*, that it should be of no avail unless an action was brought within one year afterwards, to try the right of the claimant, and unless the same were prosecuted with effect. It is to be observed, however, that, in order to bar by non-claim persons who were not parties or privies, it was necessary that the person levying the fine should be seised of the freehold, either by right or by wrong (*h*): for if he had nothing in the land, or if his possession were merely as tenant for a term of years or other chattel interest, the fine might be avoided

time for making the claim was a year and a day after the fine levied. As to proclamations, vide sup. p. 566.

(*c*) 2 Bl. Com. 354.

(*d*) Ib.; Litt. s. 441.

(*e*) See Co. Litt. by Harg. 121 a, n. (1).

(*f*) 4 Hen. 7, c. 24; Davies *v.* Lowndes, 5 Bing. N. C. 172.

(*g*) 2 Bl. Com. 356.

(*h*) Davies *v.* Lowndes, ubi sup.

by pleading *partes finis nihil habuerunt* (*i*). And it is further to be remarked, that persons having no estate in possession, but only in remainder or reversion, were not bound to make claim within five years after proclamation made, but within the same period after their right of entry accrued (*k*).

3. A fine levied by tenant in tail, with proclamations, barred the issue in tail. It had indeed been expressly provided by the Statute *de Donis*, that a fine should have no such effect (*l*); but by 32 Hen. VIII. c. 36, it was declared, that when levied with proclamations according to 4 Hen. VII. c. 24, by any person of full age, it should be a sufficient bar and discharge for ever against the tenant and his heirs, claiming only by force of the entail (*m*). It did not, however, bar those in remainder or reversion upon the entail; who (upon his death and the failure of his issue) had either a right of entry, or a right of action, according to the distinction to be presently stated (*n*).

4. If tenant in tail of a corporeal hereditament in possession levied a fine "*sur cognizance come ceo, &c.*," with or without proclamations, it was a discontinuance of the entail (*o*); the effect of which was, that the issue in tail, and those in remainder, or reversion, lost that right of

(*i*) Stat. 4 Hen. 7, c. 24; 2 Bl. Com. 356; 1 Saund. by Wms. 319, n. (1); Doe *d.* Thomas *v.* Jones, 1 Tyrw. 506.

(*k*) Co. Litt. 372 a; Saund. by Wms. ubi sup.

(*l*) 2 Bl. Com. 355; Doe *v.* Jones, 1 Tyrw. 517; Burton, 239.

(*m*) Before the statute of 32 Hen. 8, it had been held that, under the preceding Act of 4 Hen. 7, a fine with proclamations would have the effect of barring the issue in tail; but the doctrine was considered as doubtful; and the 32 Hen. 8 was passed to remove the doubt; see Co. Litt. by Harg. 121 a, n. (1).

(*n*) See 5 Cruise, Dig. 148.

(*o*) Co. Litt. 327 b; 2 Inst. 335, 336; Odiarne *v.* Whitehead, Burr. 714; 1 Saund. by Wms. 319 c, n. (1); ib. 258 a, n. (8); Doe *v.* Finch, 4 Barn. & Adol. 283; Doe *d.* Thomas *v.* Jones, 1 Tyrw. 506. The principle on which the *discontinuance* of of an estate tail proceeded is explained in Co. Litt. by Butler, 325 a, n. (1), 326 b, n. (1); Inst. ubi sup.

entry, which, upon the death of the tenant in tail, would otherwise have accrued to them respectively; but those in remainder or reversion had nevertheless a remedy in a particular form of action called a *formedon;* and so had the issue in tail, unless the fine was levied with proclamations. But a fine levied by tenant in tail of an incorporeal hereditament, or of an hereditament corporeal in remainder upon an estate of freehold, was no discontinuance (*p*). Such a fine levied in fee only created a base fee; and the estate of those in remainder or reversion (as well as the right of entry or action of the issue in tail, where it was levied without proclamations) remained without disturbance (*q*). A discontinuance might also (previously to the 8 & 9 Vict. c. 106) have been occasioned by the *feoffment* of tenant in tail (*r*); but the learning relative to discontinuances, however effected, became of no account, (so far as *future* transactions were concerned,) by the effect of a statute passed a short time previously to the Fine and Recovery Act, viz. the 3 & 4 Will. IV. c. 27, which provided (sect. 29) that no discontinuance should thereafter avail to take away a right of entry.

5. A fine "*sur cognizance come ceo, &c.*" levied by a tenant for life in possession, worked a forfeiture, if for a greater estate than the law entitled him to make; and consequently destroyed the contingent remainders (if any) expectant on his life interest (*s*). The same result as regards forfeiture also followed, where such fine was levied by a tenant for a term of years (*u*).

Secondly, of *Recoveries.*

A recovery—or a *common* recovery as it was also called,

(*p*) There could be no discontinuance of things lying in grant. (Co. Litt. 332 a; 5 Cruise, Dig. 236.)

(*q*) Co. Litt. by Butler, 331, n. (1).

(*r*) Vide sup. p. 465.

(*s*) Vide sup. p. 331; 2 Bl. Com. 274; 5 Cruise, Dig. 203, 236; 2 Cruise, Dig. 361. It is to be observed, that though a fine *sur cognizance, &c.* generally implied a conveyance in fee, it might be for life only. (Hunt *v.* Bourne, Salk. 340.)

(*u*) Burt. Compend. 318.

to distinguish it from a real adjudication in an action (*x*)—differed from a fine, in this general point of view, that it supposed a suit not immediately compromised, but carried on through every regular stage of proceeding (*y*). Its nature and progress were as follows.

[Let us, in the first place, suppose Daniel Edwards to have been tenant of the freehold, for example, tenant in tail in possession; and desirous to suffer a common recovery, in order to bar all entails, remainders and reversions, and to convey the same in fee simple to Francis Golding. To effect this, Golding was to bring an action against him for the land; and he accordingly sued out a writ called a *præcipe quod reddat*. In this writ, the demandant Golding alleged that the defendant Edwards (here called the tenant) had no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited; whereupon the tenant appeared, and called upon one Jacob Morland, who was supposed, at the original purchase, to have warranted the title to the tenant. And thereupon he prayed that the said Jacob Morland might be called in to defend the title which he so warranted. This was called the *voucher* (*vocatio*, or calling of Jacob Morland) *to warranty*, and Morland was called *the vouchee*. Upon this, Jacob Morland, the vouchee, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the court to *imparl*, or confer with the vouchee in private, which was usually allowed him as a matter of course. And soon afterwards the demandant Golding returned to court, but Morland the vouchee disappeared or made default. Whereupon judgment was given for the demandant Golding (thenceforth called the *recoveror*) to recover the land in question against the tenant Edwards, who was then the

(*x*) 5 Cruise, Dig. 269.

(*y*) 2 Bl. Com. 357.

[*recoveree;* and Edwards had judgment to recover of Jacob Morland land of equal value, in recompense for the land so warranted by him, and lost by his default; which was agreeable to the doctrine of warranty we have before mentioned (*z*). This was called the recompense, or *recovery in value*. But Jacob Morland having no land of his own, being usually the crier of the court (who from being thus frequently vouched was called the *common vouchee*), it was plain that Edwards had only a nominal recompense for the land so recovered against him by Golding; which land was then absolutely vested in the said recoveror, by judgment of law, and seisin thereof was delivered to him by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee simple from Edwards the tenant in tail, to Golding the purchaser. The recovery above described was with a single voucher only, but sometimes it was with *double*, *treble*, or further voucher, as the exigency of the case might require. And indeed, in modern times, it was usual always to have a recovery with double voucher at the least, by first conveying, where the person whose estate tail was intended to be barred was *immediate* tenant in tail, an estate of freehold to any indifferent person against whom the *præcipe* was brought, (which was called making a tenant to the *præcipe*); and then the tenant to the *præcipe* vouched the tenant in tail, who vouched over the common vouchee. For if a recovery was had immediately against a tenant in tail, it barred only such estate in the premises of which he was then actually seised; whereas, if the recovery were had against another person, and the tenant in tail were vouchee, it barred every latent right and interest which he might have in the land recovered (*a*). But where there was already a tenant for life in possession, with remainder over in tail, of course no other tenant to

(*z*) Vide sup. p. 490.

(*a*) Bro. Ab. tit. Taile, 32; Plowd., Manxel's Case [8].

[the *præcipe* was required to be made, in order to effect a voucher of the tenant in tail. If Edwards, therefore, were tenant of the freehold in possession, and John Barker were tenant in tail in remainder; here Edwards first vouched Barker, and then Barker vouched Jacob Morland, the common vouchee; who was always the last person vouched, and always made default: whereby the demandant Golding recovered the land against the tenant Edwards, and Edwards recovered a recompense of equal value against Barker, the first vouchee; who recovered the like against Morland, the common vouchee, against whom such ideal recovery in value was always ultimately awarded.]

In all recoveries it was necessary that the recoveree should be seised of the freehold in possession, else the recovery was void (*b*). For all actions to *recover the seisin* of land were required to be brought against the actual tenant of the freehold; otherwise the suit would lose its effect, since the freehold could not be recovered of him who had it not (*c*). And though these recoveries were in themselves fabulous and fictitious, yet it was necessary that there should be *actores fabulæ*, and that these should be properly qualified.

From this doctrine resulted two important corollaries; first, that where the object was to vouch a tenant in tail in possession, instead of bringing the *præcipe* against him, it became necessary that he should previously make a tenant to the *præcipe* in manner already explained,—that is,

(*b*) Pigot, 28.

(*c*) This requirement, it will be observed, applies only to actions "to recover the seisin;" that is, *real* actions, to which class the action, on which the recovery was founded, belonged. And (as will be seen hereafter) almost the whole of the real actions were abolished by 3 & 4 Will. 4, c. 27. It may further be remarked that an *ejectment* (which has long been the ordinary action for the recovery of land) has never, in its form, been brought to recover the *seisin*; and accordingly it has always been brought against a tenant, whether seised of the freehold or not.

convey a freehold estate in possession in the land to some other person, so as to qualify the latter to sustain the character of tenant in the action (*d*).

The second consequence was, that a tenant in tail *in remainder*, expectant on an estate of freehold, could not resort to a recovery to bar the entail, without the concurrence of the person in whom that precedent estate was vested; for unless the latter joined in the proceedings, there could be no sufficient tenant to the *præcipe*, he alone possessing the necessary qualification. But the nicety once thought to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, was lessened by the provision of 14 Geo. II. c. 20 (*e*); which enacted, with a retrospect and conformity to the antient rule of law, that though the legal freehold were vested in lessees, yet those who were entitled to the next freehold estate in remainder or reversion might make a good tenant to the *præcipe*; that though the deed or fine which created such tenant were subsequent to the judgment of recovery, yet if it were in the same *term*, the recovery should be valid in law;—and that though the recovery itself did not appear to be entered, or were not regularly entered on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, should after a possession of twenty years, be sufficient evidence on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. In addition to which, provision was at a later period made by 3 & 4 Will. IV. c. 74, establishing the validity of recoveries that had been suffered previously to the statute, in several other cases where they were before subject to fatal objection (*f*).

(*d*) Vide sup. p. 573.

(*e*) As to this Act, see Pigot, 41, &c.; 1 Prest. Convey. pp. 61 et seq.; Taylor *v.* Horde, 1 Burr. 115.

(*f*) 3 & 4 Will. 4, c. 74, ss. 8, 9, 10. See also 5 & 6 Vict. c. 32, with reference to the validity of certain recoveries and fines suffered and levied in the abolished Courts of Sessions, in Wales and Chester.

As to the force and effect of recoveries, supposing them to be suffered in due form, they operated,

1st. To pass to the recoveror an estate in fee simple absolute; and thereby to bar not only the estate tail itself, but all remainders and reversions expectant thereon, and all executory limitations and conditions whatever, to which it had been subject (*g*). This was not by virtue of any legislative enactment, but by construction of the courts of law, as explained more at large in a former chapter (*h*). The reasons, which really swayed the judges in allowing this effect to a common recovery, have been also before stated (*i*); but the ground on which they attempted to justify the doctrine was the supposed recompense in value awarded, in the result of this proceeding, to the tenant in tail. For it was said, that any lands which he might obtain from the common vouchee would supply the place of those which he lost by the recovery, and would descend to the issue in tail (*k*). Yet it is obvious that this recompense was merely ideal; and even if realized, it was held that it would not extend to reversioners nor (in some cases) to those in remainder (*l*); and on the whole, therefore, it is impossible not to concur in the opinion expressed by Chief Justice Willes, that it is futile to endeavour to vindicate the principle of a common recovery (*m*). There were some cases, it is to be observed, in which this proceeding would not avail to the purpose above described; for by statute 11 Henry VII. c. 20, no woman, after her husband's death, unless with the concurrence of those in reversion, could suffer a recovery of lands entailed on her by her husband, or on her and her husband by any of his ancestors; which was called an estate tail *ex provisione viri* (*n*). And it was also provided by 34 & 35 Henry VIII.

See 2 Bl. Com. 361.

(*h*) Vide sup. p. 248.

(*i*) Ibid.

(*k*) 2 Bl. Com. 360.

(*l*) Lacy *v.* Williams, 2 Salk. 569; Bl. Com. ubi sup.

(*m*) 1 Wils. 73. See Bl. Com. ubi sup. n. by Christian.

(*n*) As to this statute, see 5 Cruise's Dig. 399; Kirkman *v.*

c. 20, that no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion was in the king, should bar such estate tail, or the remainder or reversion of the crown (*o*).

2. A recovery, like a fine, would bind a married woman when she became a party to it with her husband's concurrence; and, as in the case of a fine, she was privately examined by the court in such cases, to ascertain that she acted without compulsion (*p*).

3. And lastly, a recovery suffered by a tenant for life worked a forfeiture of the particular estate, and by consequence destroyed all contingent remainders expectant thereon (*q*). It was, however, expressly provided by 14 Eliz. c. 8, that a recovery so suffered, without the consent of the persons in reversion or *vested* remainder, should as against such persons be utterly void (*r*).

Having now considered fines and recoveries in a separate point of view, it will be necessary to direct our attention shortly to an incident common to both species of assurance, viz., the deed to *lead* or to *declare* their *uses*. For as the most usual fine *sur cognizance de droit come ceo*, &c., conveyed an absolute estate without any limitations to the cognizee; and as common recoveries did the same to the recoveror; these assurances could not in themselves be made to answer the purposes of family settlements, wherein a variety of designation and arrangement is often expedient. The fine or recovery itself, like a power once gained in mechanics, was applied, therefore, through the medium of *uses*, to give efficacy to an infinite variety of movements, in the vast and intricate machine of a volu-

Thompson, Cro. Jac. 474; et post, p. 587, n.

(*o*) See Co. Litt. 372; Perkins *v.* Sewell, 1 Bl. Rep. 654; Duke of Grafton *v.* Birmingham Railway Company, 5 Bing. N. C. 27; et post, p. 587.

(*p*) 5 Cruise, Dig. 392.

(*q*) Doe *d.* Davies *v.* Gatacre, 5 Bing. N. C. 609.

(*r*) Besides those noticed in the text, a recovery had other effects; as to which, see the First Real Property Report, p. 22.

minous family settlement (*s*). And if these deeds were made previous to the fine or recovery, they were called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As, if A. (tenant in tail, with reversion to himself in fee) wished to settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee,—he had no power of doing so effectually, while his own estate tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine to (or if there were any intermediate remainders, to suffer a recovery in favour of) E., and directed that the same should enure to the uses in such settlement mentioned. This, then, was a deed to *lead* the uses of the fine or recovery; and the fine when levied, or the recovery when suffered, would enure to the uses so specified, and no other. For though E., the cognizee or recoveror, had a fee simple vested in himself by the fine or recovery, yet, by the operation of this deed, he became a mere instrument or conduit-pipe, seised only to *the use* of B., C. and D. in successive order; which use was executed immediately by force of the Statute of Uses (*t*). Or, if a fine or recovery were had without any previous settlement, and a deed were afterwards made between the parties, *declaring* the uses to which the same should be applied; this would be equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by the statute 4 & 5 Anne, c. 3, indentures to declare the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, were made good and effectual in law; and the fine and recovery were to enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts to the contrary, that had arisen on the Statute of Frauds, passed in the reign of Charles the second (*u*).

The cumbrous fictions, of which a slender abstract only

(*s*) 2 Bl. Com. 363.
(*t*) Bl. Com. ubi sup.
(*u*) 29 Car. 2, c. 3.

has been here given, constituted, in actual practice, a branch of conveyancing of the most subtle, intricate, and costly character (*x*). After being allowed for centuries to deform our jurisprudence, their inconvenience at length began to excite attention. With respect to recoveries, in particular, it was suggested long ago that they might be advantageously abolished; and the tenant empowered to bar his estate tail, by the more simple expedient of a solemn deed to be enrolled in a court of record (*y*). It was not, however, until a comparatively recent period, that this great improvement was carried into effect; and for its realization the public is indebted to the commission appointed in the ninth year of King George the fourth, to revise the laws relating to real property. At the suggestion of that body, and early in the succeeding reign, the 3 & 4 Will. IV. c. 74, was passed "For the abolition of "Fines and Recoveries, and for the substitution of more "simple modes of Assurance." This statute—to which we had before occasion briefly to advert (*z*)—in the first place enacted, that after the 31st December, 1833, no fine should be levied or recovery suffered of lands of any tenure, with the exception of such as should then be in actual progress (*a*); and then proceeded to provide new methods for effectuating, in future, such of the results of these assurances as it was deemed right to preserve, viz., the barring of estates tail, and the passing or binding of the estates or interests of married women: while, on the other hand, it purposely omitted to appoint any substitute for them, so far as regards their effect in working a forfeiture, —or the bar by non-claim, or discontinuance, in the case of a fine.

It has been suggested that our English lawyers borrowed these expedients from the *cessio in jure* of the Roman law—wherein the plaintiff claimed the subject of the proceeding in the ordinary forms of a litigation; the defendant made default; and the thing in suit was then as a matter of course adjudged to the plaintiff. See Maine on Antient Law, p. 289.

(*y*) 2 Bl. Com. 360.

(*z*) Vide sup. p. 250.

(*a*) 3 & 4 Will. 4, c. 74, s. 2.

I. In reference to the first of the results effectuated (the barring of estates tail), the enactment is in substance as follows (*y*): that every actual tenant in tail (*z*), whether in possession, remainder, contingency, or otherwise, shall have full power (subject to the provisions hereinafter mentioned as to *protectorship*) to dispose of the lands entailed (*a*), for an estate in fee simple absolute, or for any less estate, as against all persons claiming under the estate tail, or in respect of any ulterior estate (*b*). And in lieu of a fine and recovery, it directs that such disposition may be made by any of the assurances (a will only excepted) which would have sufficed for the purpose, supposing the estate to have been one in fee simple absolute; so that the disposition be an actual conveyance, and not one resting in contract only, and so that it be by deed, and inrolled in Chancery within six calendar months after execution (*c*). An estate tail in lands of freehold tenure—for copyholds are not to our present purpose (*d*)—may now consequently be barred as against the grantor himself, the issue in tail, and all others in remainder, reversion, or other expectancy (subject to the provisions as to protectorship before referred to), by any of the conveyances (whether at common law or under the Statute of Uses) which have been discussed in former chapters; always supposing such conveyance to be by deed, and by deed duly inrolled. The inrolment, indeed, is not essential in every case, it being

(*y*) 3 & 4 Will. 4, c. 74, s. 15.

(*z*) The definition of "actual tenant in tail" (as the term is used in this Act), is thus given, "the tenant of an estate tail which shall not have been barred" (sect. 1).

(*a*) The word *lands* when used generally in this Act extends to all hereditaments (except copyhold), and whether of the corporeal or incorporeal class. It extends also to copyhold, where accompanied by expressions denoting that tenure (ib.)

(*b*) In this provision, the *crown* is expressly included (sect. 15).

(*c*) Sects. 40, 73. And (by sect. 41) if the assurance be a bargain and sale, it will, if enrolled in due time in Chancery according to this Act, be as valid as if it had been duly enrolled within the time prescribed by the statute 27 Hen. 8; as to which vide sup. p. 538.

(*d*) As to copyholds, vide post, bk. II. pt. I. c. XXII.

dispensed with (as we mentioned in a former place), where the disposition is by way of *lease* not exceeding twenty-one years, to commence from the date thereof, or within twelve calendar months from the date; and reserving thereby a rack-rent, or not less than five-sixths of a rack-rent (*e*). Supposing the inrolment (when required) to be made in due time (*f*), the deed takes effect from the execution (*g*); but a subsequent deed, if first inrolled, will be entitled to priority (*h*).

To understand the provisions as to protectorship, we must recollect, that though, by a fine, the issue might always be barred at pleasure, a common recovery (which alone had any effect as regarded those in remainder or reversion) was ineffectual when suffered by a tenant in tail not having an estate of freehold in possession, unless he obtained the concurrence of the person in whom the immediate freehold was vested (*i*). Now this check would have been entirely taken off, if the new statute, in abolishing recoveries, had proceeded simply to provide that the tenant in tail might, in future, bar all parties, through the medium of a deed inrolled. But it was not the design of the legislature to go so far. The restraint in question was merely the accidental consequence, it is true, of the fiction on which a recovery was built, and its general tendencies were useless and injurious; but it happened, on the other hand, to secure one important object, that of affording protection to family settlements. For in these, it is usual to vest in the parent a life estate and to limit estates in remainder to the sons successively in tail, expectant on the determination of such life estate; and the doctrine, which required the concurrence of the immediate tenant of the freehold, put it out of the power of the eldest son (the first tenant in tail) to defeat the settlement, at his own pleasure, by a recovery; which he would otherwise

(*e*) Vide sup. p. 252.
(*f*) 3 & 4 Will. 4, c. 74, s. 41.
(*g*) Sect. 74.
(*h*) Ibid.
(*i*) Vide sup. p. 574.

have always been in a condition to do, as soon as he attained the age of twenty-one. So, far, therefore, as this object is concerned, it was deemed expedient that the substitute provided by the Act in question (when used for the purpose of a common recovery, and not merely for the purpose of a fine,) should be subjected to a check of the same description as the recovery itself; though, in other cases, the necessity for the concurrence of the person seised of the immediate estate of freehold was not retained. The specific provision to which we here refer is to the following effect (*j*): that no disposition, by a person who is tenant in tail under a settlement, shall be effectual under the Act to bar any person but those claiming by force of the entail, unless it be made with the consent of the person who (within the meaning of the Act) is "owner" of the first estate of freehold, (or for years determinable on life or lives,) prior to the estate tail (*k*): and the person, whose consent is thus required, receives accordingly the appellation of *protector of the settlement*. This provision, however, it is material to remark, is expressly confined to the case where the prior estate is created *by the same settlement* as the entail: for where it is constituted by a different assurance, the reason on which the protectorship is founded fails; and the Act consequently leaves the tenant in tail to the free exercise of his power of disposition (*l*).

Where an assurance is executed by a tenant in tail, in such form and with such attendant ceremonies as the statute requires, it passes an indefeasible estate in fee simple absolute, or for life, or years, or otherwise, according to

(*j*) 3 & 4 Will. 4, c. 74, s. 34.

(*k*) Sect. 22. The words of the Act are, "any estate for years de-"terminable on the dropping of "a life or lives, or any greater "estate, not being an estate for "years, prior to the estate tail."

(*l*) It is to be observed, that an estate created by appointment, under a power in the settlement (3 & 4 Will. 4, c. 74, s. 1), an estate confirmed or restored by the settlement (sect. 25), an estate resulting to the settlor (sect. 22), and an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement (sect. 22),—are, respectively, to be considered as "created by the settlement."

the nature of the limitation. But if it be executed without the consent of the protector, in a case where a protector exists (*m*), its effect is only to bar the tenant and his issue in tail, and the rights of other persons claiming in expectancy on the estate tail are not affected (*n*). An assurance purporting to be in fee simple absolute, will therefore in such case convey no more than a base fee determinable on the failure of issue (*o*): though it is in the power of the tenant, by afterwards obtaining the consent of the protector, and making a new disposition thereon, to enlarge such base fee into a fee simple absolute (*p*). And in the particular case, when, for want of the protector's consent, such base fee is created, and the immediate remainder or reversion in fee happens also to become united in the same person with the base fee,—the latter will *ipso facto*, and without any such consent or new disposition, enlarge into a fee simple absolute (*q*). But whether the bar effected be general or partial only in its nature, it is to be understood that in all cases it operates without prejudice to the interests of other parties not claiming by force of, or in expectancy upon, the entail. It consequently leaves all estates prior to the estate tail undisturbed (*r*).

Although, in general, the "owner" of the first prior estate (being of the kind already described) is made the protector of the settlement, yet we may remark, that there are many cases in which the qualification for the protectorship is subject to more specific provision. For first, in certain cases arising on or before 31st December, 1833 (the date from which fines and recoveries are abolished), the person, who, under the old law, would have been the proper party to make a tenant to the *præcipe*, is now, without regard to any other rule of qualification, to be

(*m*) See Bell *v.* Holtby, Law Rep., 15 Eq. Ca. 178.
(*n*) Sects. 15, 31.
(*o*) Sect. 1.
(*p*) Sects. 19, 35.
(*q*) Sect. 39.
(*r*) Sects. 15, 19.

the protector (*s*). The Act also provides that the first prior estate of freehold or of years determinable on life or lives, shall not avail to confer the protectorship on any person, who takes that estate as lessee at a rent; or as dowress, bare trustee, heir, executor, administrator, or assign (*t*)—with the exception, however, as to bare trustees, of such as, under any settlement made before the Act, would have been the proper parties to make a tenant to the *præcipe* (*u*)—the office being, in every case of exclusion, cast upon the owner of the *next* estate (if any) qualified to constitute a protectorship (*x*). Nor is the creation of the office always by the mere act of law. For the settlor himself is entitled, in the settlement creating the entail, to appoint any person or persons *in esse* (not exceeding three in number, and not being aliens,) to act in this capacity (the tenant of the prior estate being included in the number or not, at the pleasure of the settlor); and also to insert in the deed a power for the substitution of others, in the event of the death or retirement of those originally nominated (*y*).

The office is intended to be in every case a *personal* one; and therefore a protector does not lose his right to act in that capacity by a transfer of the estate in virtue of which it was acquired; whether that transfer takes place by his own alienation, or by his other act or default (*z*). But when the person who would otherwise be protector is incompetent by reason of insanity, the Lord Chancellor (or other person deputed to exercise the royal functions with respect to idiots and lunatics) is to become protector

(*s*) 3 & 4 Will. 4, c. 74, ss. 29, 30, 31.

(*t*) Sects. 26, 27.

(*u*) Sect. 31.

(*x*) Sect. 28.

(*y*) Sect. 32. At the date of this enactment an alien was not capable of holding in England any real estate. But the clause in the Naturalization Act, 1870, which removes this incapacity (33 & 34 Vict. c. 14, s. 2), would seem by implication to repeal *quoad hoc* the above exception as to the qualification of a protector of a settlement.

(*z*) Sect. 22.

in his stead: and where he, who would otherwise be protector, is disabled by treason or felony, the office is vested in Chancery; to which latter jurisdiction it is also confided in some other particular cases (*a*). A married woman is competent to be protector; and if the prior estate, in respect of which she becomes so, is settled to her separate use, she is to hold the office independently of her husband, but, where not so settled, in conjunction with him only (*b*). We may remark, too, that the office is in every case of a purely discretionary character; so that the protector is absolutely free from all control in its exercise, and cannot, even by his own previous agreement, fetter his free agency on this subject (*c*). And lastly, with regard to the consent which it is thus absolutely in his power to grant or to withhold,—that it may either be given by the same instrument which makes the disposition, or by a separate one to be executed on or before the same day with the other, and to be duly inrolled: and that when once given, the consent is incapable of being revoked (*d*).

It is not only on *legal* estates that an assurance under the statute in question will operate, nor in respect of these only that its operation was required. It is indeed generally true, that an *equitable* estate will pass by any instrument sufficient to indicate the intention of the grantor (*e*); but such estates when entailed are exceptions to the rule, and cannot be transferred except by the appropriate methods. It was consequently the practice, before the statute passed, to convey entailed equitable interests through the medium of fines and recoveries (*f*); which, though always transacted in a common law court (viz. the Common Pleas), were considered in equity as legitimate assurances for the purpose. Thus, if lands were given to the use of A. in

(*a*) Sects. 33, 48. See In re Wainwright, 13 Sim. (Ch.) 260.
(*b*) Sects. 24, 45, 79.
(*c*) Sects. 36, 37.
(*d*) Sects. 42, 44, 46.
(*e*) Vide sup. p. 384.
(*f*) 5 Cruise, Dig. 301, 461; Boteler v. Allington, 1 Bro. C. C. 72.

fee, in trust for B. in tail, with remainder over,—a fine levied or recovery suffered by B. in the Common Pleas, was recognized in the courts of equity as a bar to his equitable estate: that is, a bar to the extent to which the same assurance would have operated on a legal estate of the same description (*g*). By the Act for abolishing fines and recoveries, a similar effect now belongs to the substituted assurance; the word "estate" being used throughout its provisions, "to express an estate in equity, as well as at law" (*h*). The statute is also framed to take effect not only on actual entails, but upon money or land liable to be converted into entailed estates. This happens in the case where trustees have been directed to invest money in land, which, when purchased, is to be settled in tail for the benefit of a certain party; or to sell entailed land and to invest the produce in like manner. With respect to trusts of this description, the statute provides, that all the clauses it contains shall be applicable (so far as circumstances will permit) to the monies or lands so to be invested, in the same manner as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled conformably to the trust. But when the trust fund consists of leasehold estate, or of money, it is to be considered (as to the person in whose favour or for whose benefit the disposition is to be made) as *personal* estate; and any disposition of it by the intended tenant in tail must be made, not by a conveyance appropriate to the passing of the realty, but by a mere deed of assignment inrolled in Chancery within six calendar months after the execution (*i*).

As the power of disposition given by the Fine and Recovery Act applies both to legal and equitable interests, so it extends to almost every species of entailed estate. The only exceptions appear to be the case of tenant in tail

(*g*) See Doe *d.* Cadogan *v.* Ewart, 7 Ad. & El. 636.

(*h*) 3 & 4 Will. 4, c. 74, s. 1.

(*i*) Sect. 71.

after possibility of issue extinct (*k*); and of those who by the 34 & 35 Hen. VIII. c. 20 (*l*), or any other statute, are restrained from barring their estates tail (*m*).

II. With regard to the second object comprised in the Fine and Recovery Act, viz. the passing or binding of the estates or interests of married women (*n*), the statute contains a general provision that a feme covert shall be as competent as if she were a feme sole, to dispose by deed of lands of any tenure, or of money subject to be invested in the purchase of lands—and also to extinguish any estate which she, (or she and her husband in her right,) may have, or any power, which may be vested in her, in regard to lands or to money of that description;—provided always that her husband shall concur in the deed (*o*); and provided also that upon the execution thereof, or at some time afterwards, she shall produce the same and acknowledge it before the proper authorities (*p*). The acknowledgment may be taken either before one of the judges (*q*), or before two (now one) of the commissioners from time to time appointed for that purpose (*r*), or before a judge of a

3 & 4 Will. 4, c. 74, s. 18. As to this estate, vide sup. p. 576. By 14 Eliz. c. 8, a recovery suffered by a tenant in tail of this description was made void as against those in reversion and remainder, if suffered without their consent.

(*l*) Sect. 18. It may be remarked here, that estates tail within the restriction of 34 & 35 Hen. 8 (as to which, vide sup. p. 576), are excepted also from the operation of the powers given to the Court in reference to settled estates by 40 & 41 Vict. c. 18. (See sect. 55 of that Act.)

(*m*) Among these statutes, the 11 Hen. 7, c. 20, as to estates tail *ex provisione viri* (as to which vide sup. p. 576), is not included. For, as to future settlements of this description, that Act is repealed; and as to existing settlements, the power of disposition is conferred on the tenants of such estates, subject to their obtaining such assent as would have been required under that Act to render valid a fine or recovery. (See 3 & 4 Will. 4, c. 74, ss. 16, 17.)

(*n*) As to the general state of the law with respect to purchases and conveyances of land by married women, vide sup. p. 177.

(*o*) Sect. 77. See Cross *v.* Middleton, 25 L. J. (Ch.) 513.

(*p*) Sect. 79.

(*q*) Sect. 80.

(*r*) See Ex parte J. Menhennet, Law Rep., 5 C. P. 16; and now 45 & 46 Vict. c. 39 (Conveyancing Act, 1882), s. 7.

county court (*s*); and it is the duty of such authorities, before they receive her acknowledgment, to examine the woman apart from her husband, in order to ascertain her free and voluntary consent; and in the absence of such consent the acknowledgment is to be rejected, and the deed becomes void, as far as relates to her execution (*t*). Supposing the acknowledgment on the other hand to be received, a memorandum of the fact is to be written on the foot or margin of the deed; and a certificate thereof is to be also drawn up and signed on a separate piece of parchment, and verified by affidavit; and the certificate and affidavit are then to be filed of record in court. Until so recorded, the deed will have no effect as regards the party under coverture (*u*); but, when the record is complete, it will operate to affect her interest, (by relation,) as from the time when it was acknowledged. When the object of the disposition is to bar the estate *tail* of a married woman, the same course of proceeding is to be observed as in the case of other tenants in tail; and the ceremony of acknowledgment (with all its attendant forms) is to be superadded (*v*).

The proceedings relative to acknowledgment are made subject, as to some of their details, to the regulation of the Common Pleas (*x*) and now of the High Court; and the court is also empowered by order, in a summary way upon the application of the wife, and upon such evidence as to the court shall seem meet, to dispense (in every case where it shall appear reasonable to do so) with the concur-

(*s*) 19 & 20 Vict. c. 108, s. 73.

(*t*) 3 & 4 Will. 4, c. 74, s. 80.

(*u*) See Jolly *v.* Handcock, 7 Exch. 820.

(*v*) Sects. 40, 79, and see Conveyancing Act, 1882, s. 7.

(*x*) Sect. 89. The Rules of Court on this subject are subject to be relaxed should such indulgence seem proper. (See Re Hannah Packer, Law Rep., 5 C. P. 424.) By 17 & 18 Vict. c. 75 (passed to remove some doubts which had arisen on the point), no deed acknowledged before a judge or commissioner shall be impeached, after certificate filed, by reason only that such judge or commissioner was personally interested in the transaction. And see now the Conveyancing Act, 1882, s. 7; the Judicature Act, 1879 (42 & 43 Vict. c. 78), s. 4; and Ord. LXA. (Dec. 1879), r. 7, and (April, 1880), r. 5.

rence of the husband in her acts, whether in barring an estate tail, or executing a deed for any other purpose (*y*). The latter provision, however, is made with an express saving of such rights as the husband may possess independently of the Act (*z*).

Such are the substitutes now provided by the legislature, in lieu of fine and recovery. The superiority of the new methods is manifest at the first glance; but, in order to obtain a clear idea of the extent and nature of the reform which was effected by the statute, it will be useful to advert to some of the specific points of difference between the present and the former system.

The most obvious improvement is, that, instead of applying modes of assurance altogether peculiar and anomalous, to the case where a tenant in tail or a married woman is the conveying party, the law now enables them to pass their interests, by an instrument of the same description (in general) as is used in other alienations of real estate; and thus establishes a greater uniformity in the methods of conveyance. Nor is this a benefit of small amount; for all deviations from general rule engender difficulties, render the practice of the law less certain, and powerfully promote the purposes of chicanery. The forms now introduced possess also the advantage of being incomparably clearer and simpler than those which they superseded. Considerable subtlety indeed attends a conveyance taking effect under the Statute of Uses; but it is to be recollected that fines and recoveries (when taken in connection with their appendages, the deeds to lead or declare the uses)

(*y*) 3 & 4 Will. 4, c. 74, s. 91. See Re Dixon, 4 C. B. 631; Ex parte Taylor, 7 C. B. 1; Re Eden, 28 L. J., C. P. 4; Ex parte Haigh, 2 C. B., N. S. 198; Ex parte Anderson, ib. 118; Ex parte Fish, 9 C. B., N. S. 715; Re Sarah Price, 13 C. B., N. S. 286; Re Alice Rogers, Law Rep., 1 C. P. 47; Goodchild *v.* Dougal, ib. 3 Ch. D. 650. The court has power, under this section, to authorize her to dispose of *copyhold*. (Ex parte Shirley, 1 Arnold, 584.)

(*z*) 3 & 4 Will. 4, c. 74, s. 91.

themselves operated as conveyances under the statute; while at the same time they involved a fiction of the most intricate and artificial description, from which the substituted assurances are exempt. To this it may be added (and the point is by no means of subordinate importance), that the substitutes are considerably less expensive than their predecessors; the charges connected with a fine or recovery (particularly the latter) having been so high as to have formed one of the most prominent reasons for their abolition. To pass from general to particular considerations, the former system was objectionable, from the necessity which it frequently occasioned of creating a *tenant to the præcipe;* for, besides the inconvenience of being obliged to make an actual transfer of the freehold, for this purpose, to a stranger, it frequently happened that parties, without whose concurrence the freehold could not be effectually conveyed, were by some mistake not joined in the proceedings, or refused to join in them, or could not be discovered (*a*). But, under the new system, all these annoyances are, by a neat and simple arrangement, avoided; while the only real benefit resulting from the antient practice, is at the same time effectually secured. For as the protector is always constituted by the same settlement as the tenant in tail, there can rarely be any difficulty in finding him out; and supposing the relation of parent and child to exist between them (as will usually be the case), there can be no reason to fear that compliance will be refused from an unworthy motive; nor, in case of compliance, will any conveyance to a stranger be necessary, the mere consent of the protector (given in due form) being all that the statute requires. It ought, lastly, to be mentioned, as a further recommendation of the modern assurances, that they are capable of being executed at any time that convenience may suggest; in which respect they differ materially from the former methods, particularly that of recovery, which could not be transacted except during the *law terms;* for, as it was at

(*a*) See the First Real Property Report, p. 24.

those stated times only that (under the forensic system then prevailing) the Court of Common Pleas was open, some of the proceedings in the fictitious suit were necessarily confined to the same periods; from which circumstance it frequently resulted that the death of parties would intervene to prevent the intended recovery, and defeat for ever the purposes which it was designed to effectuate (*b*).

(*b*) The reader desirous of further information with respect to the Fine and Recovery Act, will find it amply discussed in the first volume of Mr. Hayes's Introduction to Conveyancing.

CHAPTER XX.

OF THE CONVEYANCE BY DEVISE.

THE modes of assurance hitherto examined, all operate or come into force from the time of the execution of the instrument (*a*): but there is another (and it is the last conveyance of an ordinary kind, to which we shall have occasion to refer), which is founded on a different principle; and this is a devise by last will and testament (*b*). For a will is of no force until after the death of the disposing party, but during his life is (in the language of the law) merely *ambulatory*, that is, of an unsettled and fluctuating character. "*Omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem*" (*c*).

[A *will* or *testament* are terms generally used without distinction, to express the instrument by which a man makes a voluntary disposition of his property, after his death; and we are told by the old Roman lawyers that it is "*voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit*," the legal declaration of a man's intentions, which he wills to be performed after his death (*d*). It is called *sententia* to denote the circumspection and prudence with which it is supposed to be made; it is *voluntatis nostræ sententia*, because its efficacy

(*a*) Shelford on Wills, 5.

(*b*) The term *conveyance* is sometimes applied to an alienation *inter vivos* exclusively, and so as not to include a will. But it is also properly used, in the larger sense to it in the present work.

(*c*) Co. Litt. 112.

(*d*) Ff. 28, 1, 1. The above is from Modestinus. Ulpian gives the following,—*mentis nostræ justa contestatio, in id solemniter jacta, ut post mortem nostram valeat.* (Reg. 20, 1.)

[depends on its declaring the testator's intention, whence it is emphatically styled his *will* (*e*); it is *justa sententia*, that is, drawn, attested, and published, with all due solemnities and forms of law; it is *de eo quod quis post mortem suam fieri velit*, because it is of no force until after the death of the testator.] While defining a will, we may also take occasion to explain the term *codicil*, which is derived from the Latin *codicillus* (importing a little book or writing), and is an instrument made subsequently to the original will, by which its dispositions are added to, explained, or altered (*f*). It is subject, in general, to the same remarks as the original instrument itself, of which indeed it is considered as forming a part (*g*); so that what may be laid down as law relating to a will, may be taken generally as applicable also to all codicils thereto annexed (*h*).

[With respect to the principle on which a disposition by will is allowed, we have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary, for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienation. But these precautions would be very short and imperfect if they were confined to the life of the occupier; for then upon his death all his property would again become common, and create an infinite variety of strife and

(*e*) As to the *knowledge* of the testator of the contents of the will being essential to its validity as such, see Hastilow *v.* Stobie, Law Rep., 1 P. & D. 64.

(*f*) Hence, a codicil properly executed and attested may give validity to an insufficient bequest in the will to which it is annexed. See Anderson *v.* Anderson, Law Rep., 13 Eq. Ca. 381.

(*g*) When a testator by a codicil confirms his will, all previous codicils unrevoked are thereby also confirmed. (Green *v.* Tribe, Law Rep., 9 Ch. D 231.)

(*h*) 2 Bl. Com. 500. In the new Statute of Wills, 7 Will. 4 & 1 Vict. c. 26, the term "will" is to be taken as extending to a codicil also (sect. 1).

[confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property, after his death, in such persons as he shall name (*i*).

Testaments are of very great antiquity. We find them in use among the antient Hebrews; though the example usually given of Abraham's complaining that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir (*j*)—will be hardly thought quite conclusive to show that he had made him so by *will*. And indeed a learned writer has adduced this very passage in Genesis to prove that in the patriarchal age, on failure of children or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law (*k*). But—to omit what Eusebius and others have related of Noah's testament made in *writing*, and witnessed under his *seal*, whereby he disposed of the whole world (*l*) —it is apprehended that a much more authentic instance of the early use of testaments may be found in the sacred writings, wherein Jacob bequeaths to his son Joseph a portion of his inheritance, double to that of his brethren (*m*): which bequest we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes (those of Ephraim and Manasseh), and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens (*n*), but in many other parts of Greece they were totally discountenanced (*o*). In Rome they were unknown until the laws of the Twelve Tables were compiled, which first gave the right of

(*i*) Puff. L. N. lib. 4, c. 10.

(*j*) Genesis, c. 15. See Barbeyr. Puff. 4, 10, 4; Godolph. Orph. p. 1, 1.

(*k*) Taylor, Elem. Civ. Law, 517.

(*l*) Seld. de Succ. Eb. c. 24.

(*m*) Genesis, c. 48.

(*n*) Plutarch in Vitâ Solon.

(*o*) Pott. Antiq. l. 4, c. 15; Hermann's Antiq. s. 20.

[bequeathing (*p*): and among the Northern nations, particularly among the Germans, testaments were not received into use (*q*). And this variety may serve to evince that the right of making wills and disposing of property after death, is merely a creature of the civil state; which has permitted it in some countries, and denied it in others. And even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven (*r*).]

In this country, both real and personal estate have long been capable of transmission by will, and a modern statute (7 Will. IV. & 1 Vict. c. 26), to which we shall soon have occasion more particularly to refer, confirmed and further regulated this power in the year 1837, and placed it, for the future, on a new basis. As regards personal estate, however, and chattels real (which are considered as personalty), and also as relates to copyholds, it would be premature to consider fully, in this part of our work, the law of testamentary disposition (*s*); and we shall chiefly confine our present inquiries to the nature of that law as it affects estates of freehold duration and tenure; or, as it is commonly expressed, the law of *devises*.

To obtain a clear idea of this subject, it will be desirable to consider under separate heads:—I. The power of devise itself,—to what person it belongs, and to what estates and interests it applies. II. The solemnities which attend the execution, revocation and revival of a will. III. The rules of construction to which devises are subject. IV. The operation of a devise in conveying or limiting real estate.

I. [As to the power of devising, it seems sufficiently clear that, at a period antecedent to the Conquest, lands

(*p*) Inst. 2, 22, 1. See Vin. lib. 2, t. 10.

(*q*) Tacit. de Mor. Germ. 20.

(*r*) Vide sup. p. 163; 2 Bl. Com. 13.

(*s*) As to the title to *personal* estate by will or administration, vide post, bk. II. pt. II. c. VII.; and as to devises of *copyhold*, post, c.

[were devisable by will in this country (*x*). But upon the introduction, which took place after that event, of the military tenures, a restraint on devising lands naturally followed as a branch of the feudal doctrine of non-alienation without consent of the lord. So that *after* the Conquest, no estate greater than for term of years could be disposed of by testament (*y*),—except only in Kent and in some antient boroughs, and a few particular manors, where their Saxon immunities by special indulgence subsisted (*z*). And though the feudal restraint on alienation by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity, and imposition on the testator *in extremis*, which made such devises suspicious (*a*). Besides, in devises there was wanting that general notoriety and public designation of the successor, which, in descents, is apparent to the neighbourhood; and which the simplicity of the common law always required in any transfer and new acquisition of property.

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the legal estate, uses began to be devised very frequently (*b*); and the devisee of the use could, in Chancery, compel its execution. For it is observed by Gilbert (*c*), that as the Popish clergy then generally sat in the Court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those who, according to the superstition of the times, could intercede for their happiness in another world. But by the effect of the statute 27 Hen. VIII. c. 10, these uses afterwards became legal estate, which was not at that time devisable; and this might have occasioned a great revolution in the law

Wright's Ten. 172.
(*y*) 2 Inst. 7.
(*z*) Litt. s. 167; Co. Litt. 111. Vide Rob. Gavel. 235; sup. pp. 163, 213, 214.
(*a*) Glan. lib. 7, c. 1.
(*b*) Plowd. 414.
(*c*) On Devises, 7.

[of devises, had not the *Statute of Wills* been made about five years after—viz. 32 Hen. VIII. c. 1 (explained by 34 & 35 Hen. VIII. c. 5,)—which enacted that all persons being seised in fee simple (except feme coverts, infants, idiots, and persons of nonsane memory,) might by will and testament in writing devise to any other person, (except to bodies corporate,) *two-thirds* of their lands, tenements and hereditaments held in chivalry, and the *whole* of those held in socage; which afterwards, through the alteration of tenures by the statute of Charles the second, amounted to the whole of their landed property, except their copyhold (*d*).]

A devise under these statutes took effect, not only upon legal, but also upon equitable estate; which indeed (as already explained) will pass under any form of conveyance applicable to the former species of interest (*e*). The statutes did not, however, apply to the *chattels* of the testator, whether consisting of terms of years in land, or of things personal; for the aid of the legislature was not in the time of Hen. VIII. required as to these; as we shall have occasion to show more particularly in a subsequent part of the work (*f*). And with respect to a freehold interest, a devise under these statutes was inoperative, unless the land belonged to the testator at the time of executing the will. So that lands acquired after execution were incapable of passing under the devise; and if the testator was desirous of including them in his testamentary dispositions, a new will or codicil, or a re-execution of the existing will, was required for the purpose (*g*).

It may also be remarked, as to the persons capable of

(*d*) Vide sup. p. 163, and see Butler and Baker's case, 3 Rep. 25; Arthur *v.* Bokenham, 11 Mod. 148; Wyndham *v.* Chetwynd, Burr. 420.

(*e*) Vide sup. p. 384.

(*f*) Vide post, bk. II. pt. II. c. VII.; 2 Bl. Com. 374.

(*g*) 2 Bl. Com. 378. See Arthur *v.* Bokenham, ubi sup.; Langford *v.* Pitt, 2 P. Wms. 629; Marston *v.* Roe, 8 Ad. & El. 14. But after-acquired *personal* estate has been always capable of passing under a will previously made.

becoming devisees, that the statutes of Hen. VIII. made an express exception of corporations, which was done to prevent the extension of gifts in mortmain (*i*); though it was afterwards held, that a devise to a corporation for a *charitable* use was valid, as operating in the nature of an appointment, rather than a bequest (*k*). But we have had occasion in another place to advert to the statute 9 Geo. II. c. 36, by which devises to charitable uses are now generally made void; and which has consequently rendered that decision, and some others of the same tendency, less material (*l*).

Such was the power of devising as it existed at the date of the 7 Will. IV. & 1 Viet. c. 26; and thus it still stands with respect to all wills made before 1st January, 1838: but as to all wills executed on or after that day, the law must now be looked for in the provisions of that statute, often called, in contradistinction to the old Statute of Wills, "The New Wills Act." This enacted that (with the exceptions presently to be noticed) it shall be lawful for any person (being of full age, and if a female being unmarried) to dispose by will of all real and personal estate, legal or equitable, to which he or she shall be entitled at the time of death, and which, but for such disposition, would pass either to the heir at law or to the personal representatives (*m*); and the Act expressly extends this power of disposition to an estate held *pur autre vie*; to any contingent, executory, or other future interest; and even to a right of entry upon land, a class of interest previously considered incapable of being devised (*n*). The

(*i*) 2 Bl. Com. 375.

(*k*) Ib.

(*l*) Vide sup. p. 462; Bl. Com. ubi sup.

(*m*) "Real estate" shall extend to all manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary, or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to every estate, right, or interest therein, other than a chattel interest; and "personal estate" to all property whatsoever which by law devolves upon the executor or administrator. (7 Will. 4 & 1 Vict. c. 26, s. 1.)

(*n*) See Doe r. Tomkinson, 2

power is also expressly extended to after-acquired property, by a provision that all real and personal estate, to which the testator is entitled at the time of his death, shall pass, notwithstanding that he may become entitled to the same subsequently to the execution of his will (*o*). And it is further to be remarked, as to the person capable of taking by devise, that there is no exception in this Act (as under the former statutes) with regard to corporations; so that a devise to a body corporate is now valid; subject to the enactments of the Statutes of Mortmain, by which corporations are required to obtain the crown's licence, to enable them to become the *holders* of land (*p*); and subject also to the prohibition of 9 Geo. II. c. 36, as to a devise to *charitable* uses. On the other hand, the Act contains an express exception to the power of devising, in reference to married women and infants—the first being only allowed to make a valid disposition in cases in which they might have done so before the Act (*q*), and minors being made wholly incompetent—and to these we must of course understand the exception to be tacitly added which would be introduced by the general rules of law, in respect of idiots, insane persons, and others labouring under personal incapacity to convey in any manner whatever (*r*).

Mau. & Sel. 165; Roe *v.* Jones, 1 H. Bl. 30; 3 T. R. 88; Goodright *v.* Forrester, 8 East, 552.

(*o*) 7 Will. 4 & 1 Vict. c. 26, s. 3. See Marston *v.* Roe, 8 Ad. & El. 14.

(*p*) Vide sup. p. 456.

(*q*) 7 Will. 4 & 1 Vict. c. 26, ss. 7, 8. Before the Act, a married woman could not in general dispose of land by will; (see Forse and Hemblling's case, 4 Rep. 60 b;) but might do so under a *power* of appointment by will expressly conferred on her for the purpose. (See Johns *v.* Dickinson, 8 C. B. 934.) And she might dispose of what had been settled to her *separate use*, even without any express power given to her. (See Taylor *v.* Meads, 34 Law Journ. Rep., p. 203; Pride *v.* Bubb, Law Rep., 7 Ch. App. 64.) It is to be observed that the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), expressly makes all *investments* by a married woman of her own earnings, &c., gained independently of her husband, property "held and settled to her separate use." See also the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(*r*) Vide sup. p. 475. As to the disposing power of a person

II. With respect to solemnities. When the Statute of Wills (32 Hen. VIII. c. 1) had for the first time given efficacy to devises of the realty, innumerable frauds and perjuries were quickly introduced (*u*): which can excite no surprise when we consider that bare notes, in the handwriting of another person, then became good wills within the statute if only *published* as such; that is, declared by the testator to be intended to operate as his last will and testament (*x*). For except *publication* no other ceremony had been essential to a written will of personalty, before this statute passed (*y*); and the statute itself prescribed no particular solemnity in reference to a devise of real estate, except that it required the will to be *in writing*. [To remedy which the *Statute of Frauds and Perjuries* (29 Car. II. c. 3), directed, amongst other things, that devises of lands and tenements should not only be in writing, but be signed by the testator, or by some other person for him in his presence and by his express direction (*z*); and should also be subscribed, in his presence, by three credible witnesses (*a*). And a solemnity nearly similar was, by the same Act (sect. 6), made requisite for *revoking* a devise by writing (*b*); though the same might be also revoked by the burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence, and with his consent, if done *animo revocandi* (*c*): as it might also be, impliedly, by any new modification of the interest of the devisor in the estate devised (*d*); or

tially insane, see Smith *v.* Tebbitt, Law Rep., 1 P. & D. 398; Banks *v.* Goodfellow, ib. 5 Q. B. 549.

(*u*) 2 Bl. Com. 376.

(*x*) Ibid.

(*y*) As to publication, see Doe *v.* Sir F. Burdett, 4 Ad. & El. 14.

(*z*) As to signing by a *mark*, see Baker *v.* Denning, 8 Ad. & El. 94.

(*a*) See Roberts *v.* Phillips, 4 Ell. & Bl. 450.

(*b*) See Swinton *v.* Bailey, Law Rep., 1 Ex. D. 110. It may be remarked here, that a will is always capable of revocation, though it purport in the strongest words to be irrevocable; for to hold the contrary, says Lord Bacon, would be for a man to deprive himself of that which of all other things is most incident to human condition; and that is, alteration or repentance. (Bac. Elem. c. 19.)

(*c*) See Andrew *v.* Motley, 12 C. B., N. S. 514.

(*d*) See Sparrow *v.* Hardcastle,

[by such a great and entire alteration in circumstances as arose from marriage and the birth of a child (*e*), or, in case of a woman, by marriage only (*f*).] In the construction of the above enactment of the Statute of Frauds, it was settled that the testator's name, written with his own hand at the beginning of his will, as "I John Mills do make this my last will and testament," was a sufficient signing, if intended as such by the testator (*g*). It was also adjudged that though the witnesses must all see the testator sign, or at least acknowledge his signature, yet they need not all be present at the same time (*h*); though they must all subscribe their names *in his presence*, lest by any possibility they should mistake the instrument (*i*). And the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they came to a resolution not to allow any legatee, nor, by consequence, a creditor by simple contract, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest that the will in question should be established (*k*). For, in that case, he gained a security for his legacy (or debt) from the real estate; whereas otherwise, as the law then stood, he had no claim but on the personal assets. [This determination, however,

3 Atk. 802; Williams *v.* Owens, 2 Ves. jun. 599; Langford *v.* Little, 8 Ir. Eq. R. 546; see also the 4th Real Prop. Rep. p. 24.

(*e*) See Re Cadywold, 1 Swab. & Trist. 34. Blackstone (vol. ii. p. 502) observes, that revocation by the birth of a child bears some analogy to the Roman rule, which set aside a testament as *inofficious*, if any child was wholly passed by therein without assigning a sufficient reason. And to this rule he is inclined to attribute the vulgar error as to the necessity of leaving the heir one shilling, or some amount of legacy, in order to cut him off effectually.

(*f*) Forse and Hembling's case, 4 Rep. 60 b.

(*g*) See 2 Bl. Com. by Chitty, 376, n. (6).

(*h*) Freem. 486; 2 Ch. Ca. 109; Prec. in Ch. 185.

(*i*) Longford *v.* Eyre, 1 P. Wms. 740.

(*k*) Holdfast *v.* Dowsing, Stra. 1253. *Contra*, Wyndham *v.* Chetwynd, Burr. 414.

[alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts,—every disposition in the will, so far as it related to real property, would be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony (*l*). The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted,—leaving their credit, (like that of all other witnesses,) to be considered on a view of all the circumstances, by the court and jury before whom such will should be contested.]

Such is still the law as to the execution and attestation required for wills made before 1st January, 1838 (*m*); but the provisions previously in force are, by 7 Will. IV. & 1 Vict. c. 26, repealed as to all wills made *on or after* that date (*n*); and it is now enacted (*o*), that no will (whether operating on real or on personal estate, or on both) shall be valid (*p*), unless it be in writing, and signed at the foot

(*l*) As to the effect of a will (made prior to the New Wills Act) being attested by an interested party, see Cresswell *v.* Cresswell, Law Rep., 6 Eq. Ca. 69.

(*m*) 7 Will. 4 & 1 Vict. c. 26, s. 34. By this section, every will re-executed, or re-published or revived by any codicil, shall, for the purposes of the Act, be deemed to have been made at the time when so re-executed, re-published, or revived. (See Doe *v.* Walker, 12 Mee. & W. 591; Winter *v.* Winter, 5 Hare, 306.) The statute extends to wills made before 1st January, 1838, if altered subsequently to that date. (Croker *v.* Hertford, 4 Moore's P. C. Cases, 339.)

(*n*) Sect. 2.

(*o*) Sects. 9, 11.

(*p*) With regard, however, to

or end thereof, by the testator or some other person, in his presence, and by his direction (*q*); such signature being also made or acknowledged by him, in the presence of *two* or more witnesses present at the same time, and such witnesses attesting and subscribing the will in his presence (*r*). Where these requisites, however, are complied with, no other is now imposed by law; and the statute expressly enacts that no *publication*, other than is implied in the execution so attested, shall in future be necessary (*s*).

The former provisions with respect to the competency of witnesses having an interest, are also repealed as to wills taking effect under the new law (*t*); and the new enact-

wills of *personalty* made by *soldiers* or *seamen* on actual service, and the distribution of their effects when intestate, see 29 Car. 2, c. 3, s. 22; 17 & 18 Vict. c. 104, ss. 194—204; 28 & 29 Vict. cc. 72, 111.

(*q*) By 15 & 16 Vict. c. 24, it is made sufficient if the signature of the testator or testatrix be placed *at* or *after*, or *following*, or *under*, or *beside*, or *opposite to* the end of the will in such manner that it shall be apparent on the face of the will, that it was intended to give effect by such signature to the writing signed as the will; but the signature is not sufficient to give effect to any disposition *underneath* or *following* it, or *inserted after the signature is made*. (As to this provision, see Re Peach, 1 Swab. & Trist. 138; Trott *v.* Skidmore, 2 Swab. & Trist. 12; Re Williams, Law Rep., 1 P. & D. 4; Re Dallow, ib. 189.) In practice *every sheet of paper* used for the will is signed at the margin by the testator.

(*r*) As to *attestation*, see Ilott *v.* Genge, 4 Moore's P. C. Cases, 265; In re William Frith, 1 Swab. & Trist. 8; Charlton *v.* Hindmarsh, 8 H. of L. Ca. 160; Re Drummond, 2 Swab. & Trist. 8; Re Wilson, Law Rep., 1 P. & D. 269; Blake *v.* Blake, 7 P. Div. 102. The attestation may be thus worded: "Signed, published and declared "by the said A. B., the testator, "as and for his last will and testament, in the presence of us, "present at the same time, who "at his request, in his presence, "and in the presence of each other, "have hereunto subscribed our "names as witnesses."

(*s*) See also the provisions in 24 & 25 Vict. c. 114, as to wills of British subjects residing abroad at the time of death, so far as relates to *personal* estate. It may be remarked here, that *appointments by will under a power* are to be executed and attested in the same manner with other wills; even where other solemnities have been prescribed by the donor of the power (7 Will. 4 & 1 Vict. c. 26, s. 10); a provision parallel to which has been since made by 22 & 23 Vict. c. 35, s. 12, as to appointments by *deed* under a power; vide sup. p. 553, n.

(*t*) 7 Will. 4 & 1 Vict. c. 26, ss. 14, 15, 16, 17.

ments on this subject are, first, that the incompetency of any attesting witness shall not invalidate the will; secondly, that any beneficial gift or appointment by the will to an attesting witness, or to the husband or wife of an attesting witness, (except a charge for payment of debts,) shall be void, and the evidence of the witness admissible; thirdly, that where land is charged by the will with payment of debts, and the creditor (or husband or wife of the creditor) is an attesting witness, such witness shall nevertheless be competent; fourthly, that no person shall be incompetent as a witness, on account of his being an executor of the will. These enactments, however, are now of the less importance, as by the subsequent statutes of 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99, the objection to a witness on the ground of *interest*, (which once applied generally in our law, and not merely in the instance of wills,) is in all cases taken away (*u*).

As to revocation, also, the former law was altered by the New Wills Act; and it is provided (sect. 18), that every will taking effect under this statute shall be revoked by *the marriage* alone either of a testator or of a testatrix—unless, indeed, such will was made in exercise of a power of appointment, and in a case where the estate would not have passed, in default of appointment, to his or her representatives: but that, on the other hand, no will shall be revoked by any presumption of an intention to revoke, raised by any alteration in circumstances or otherwise, except only by marriage as aforesaid (*x*). A revocation may, however, take place by the execution of another will or of a codicil, or of some writing of revocation executed like a will (*y*), or by the burning, tearing, or other destruction

(*u*) There is, however, in both of these statutes, a proviso that this shall not be taken to repeal the enactments of 7 Will. 4 & 1 Vict. above referred to; and consequently a gift or appointment to an attesting witness, or to the husband or wife of an attesting witness, will still be void. And see Thorpe *v.* Bestwick, 6 Q. B. D. 311.

(*x*) 7 Will. 4 & 1 Vict. c. 26, s. 19. See De Pontes *v.* Kendall, 10 W. R. 69.

(*y*) It may be remarked that, as

of the original will (*animo revocandi*), by the testator or some person in his presence and by his direction (*z*). But no alienation of the property devised or other act (other than of the class above noticed), subsequent to execution, will prevent the devise taking effect on any estate disposable by the testator at his death (*a*). With respect to obliteration or other alteration made after execution, it is provided that they are to have no effect (where the original meaning can still be deciphered) unless executed with the same ceremonies as the will itself (*b*); though it will be sufficient if the signature of the testator, and the subscription of the witnesses, be made opposite or near the part altered, or at the foot or end of some memorandum written on the will, and referring to the alteration (*c*). And so when a will is once revoked, it is not to be *revived* otherwise than by re-execution of the original, or by a codicil duly executed and showing an intention of revival (*d*).

III. With respect to the construction of devises, they are subject, in a great measure, to the same rules of interpretation as apply to conveyances by deed (*e*); but as

the general rule, no effect will be given by the Court to any letter of direction or other supplementary paper, unless the same has been duly executed as a will. See M'Cormick *v.* Grogan, Law Rep., 4 App. Ca. 82; and disting. Singleton *v.* Tomlinson, 3 App. Ca. 404.

(*z*) 7 Will. 4 & 1 Vict. c. 26, s. 20. See Francis *v.* Grover, 5 Hare, 39; Price *v.* Powell, 3 H. & N. 341; Elms *v.* Elms, 1 Swab. & Trist. 155; Eckersley *v.* Platt, Law Rep., 1 P. & D. 281.

(*a*) 7 Will. 4 & 1 Vict. c. 26, s. 23. Prior to this Act it had been held that lands devised, and afterwards sold and re-acquired by the testator, would not pass under the original devise, unless the will was republished or revived.

(*b*) See as to alterations or erasures, Gann *v.* Gregory, 22 L. J. (Ch.) 1059; Re James, 1 Swab. & Trist. 238. Et vide sup. p. 498, n.

(*c*) 7 Will. 4 & 1 Vict. c. 26, s. 21.

(*d*) Sect. 22. As to revival, see Andrews *v.* Turner, 3 Q. B. 177; In the goods of William Brown, 1 Swab. & Trist. 32. As to re-execution, Dunn *v.* Dunn, Law Rep., 1 P. & D. 277.

(*e*) See Clayton *v.* Lord Nugent, 13 Mee. & W. 200. As to these rules of interpretation, vide sup. p. 501.

in making a will, a party is supposed to be *inops consilii* (*f*), there are instances in which the law will carry his intended limitations into effect, though the words used would be insufficient or improper for the purpose in a deed (*g*). Thus it has always been held that a fee might be conveyed by way of devise without legal words of inheritance, and an estate tail without words of procreation (*h*), provided that other words were used sufficient to indicate the design (*i*); though in conveyances by deed, the case, as we have seen, used to be otherwise (*k*). [So an estate may pass under a will by mere implication, without any express words to direct its course. As where a man devised lands to his heir at law, after the death of his wife. Here though no estate was given to the wife in express terms, yet she was held to have an estate for life by implication (*l*); for the intent of the testator was clearly to postpone the heir, until after her death; and if she did not take it nobody else could. So also where a devise was of Blackacre to A. in tail, and of Whiteacre to B. in tail, and if they both died without issue, then to C. in fee:—here it was held that A. and B. had *cross-remainders* by implication; and that on the failure of either's issue, the other or his issue would take the whole, and C.'s remainder over be postponed till the issue of both should fail (*m*). But where any implications are allowed, they must be such as are necessary, or at least highly probable, and not merely possible implications (*n*).] There is also this difference between deeds and wills in point of construction, that

(*f*) 2 Bl. Com. 172.

(*g*) Co. Litt. by Butler, 272 a, n. (1); Doe *v.* Roberts, 7 Mee. & W. 386; Slater *v.* Dangerfield, 15 Mee. & W. 263. As to the construction of wills in reference to the description of the *devisee*, see Doe *v.* Hiscocks, 5 M. & W. 363; Doe *v.* Rouse, 5 C. B. 422; In re Ingle's Trusts, Law Rep., 11 Eq. Ca. 578.

(*h*) Doe *v.* Bannister, 7 Mee. & W. 298; Lewis *v.* Puxley, 16 Mee. & W. 733; vide sup. p. 245.

(*i*) See Lloyd *v.* Jackson, Law Rep., 2 Q. B. 269.

(*k*) Vide sup. p. 237.

(*l*) See 1 Vent. 376.

(*m*) Freem. 484. As to cross-remainders, vide sup. p. 354.

(*n*) Vaugh. 262.

supposing a will to contain two inconsistent clauses, that which comes last in order shall prevail (*o*); though in a deed (as we have seen) the preference is due to that which comes first (*p*).

A devise also is subject to a less strict rule, than a conveyance by deed, in respect of the description of the thing granted. Thus, if I convey my house by deed, without any specification of land, we have seen that no land can pass, except the orchard, garden and curtilage (*q*); but the question what shall pass by the *devise* of a house (or of a house "with the appurtenances") is purely a question of intention, to be determined, like other points of construction, by the tenor of the whole will. A devise in either form may, under special circumstances, have the effect of passing adjacent land or buildings (*r*).

There are also some particular points of construction with regard to devises, which have been established by parliamentary enactment. For the former state of the law upon these points, as settled by judicial decisions, being deemed unsatisfactory, it was thought fit, in the New Wills Act to regulate them for the future upon different principles. The new statute, however, it must be recollected, does not extend to wills executed before 1st January, 1838, which consequently remain subject, in respect of the same questions, to the *former* rules of interpretation. The points to which we refer are principally as follows.

1. As the dispositions made by a testator cannot take effect, and are not intended to take effect, till after his

(*o*) There is some contrariety in the books as to this point; but the doctrine laid down in the text, appears to be supported by the better authorities. (See Co. Litt. 112 b; Plowd. 541, *in notis;* Doe *d.* Spencer *v.* Pedley, 1 Mee. & W. 677.)

(*p*) Vide sup. p. 503.

(*q*) Vide sup. p. 487.

(*r*) 2 Saund. by Wms. 401, n. (2). See also the following cases on the construction of wills, in reference to the description of the *thing devised:* Doe *v.* Cranstoun, 7 Mee. & W. 3; Doe *v.* Lightfoot, 8 Mee. & W. 553; Doe *v.* Earles, 15 Mee. & W. 450; Webber *v.* Stanley, 16 C. B., N. S. 698; Travers *v.* Blundell, 6 Ch. Div. 436.

death, it has often become a question whether in his description of the property devised, or of the persons in whose favour he devises, he shall be considered as referring to the state of things which exists when he executes his will, or to that which may exist at the time of his death. As to bequests of personal estate, the rule has always been, that the will speaks as at the time of death: but in devises of the realty, the opposite construction (as we have seen) formerly obtained; and the will was held to speak, in general, as at the time of its execution (*s*). But the new statute has now assimilated the construction of *devises* upon this point, to that of *personal bequests;* for it provides, "that every will shall be construed, with refer-"ence to the real estate and personal estate comprised in "it, to speak and take effect as if it had been executed "immediately before the death of the testator, unless a "contrary intention shall appear by the will" (*t*).

2. Though (as before observed) an estate in fee was always allowed to pass by devise, without apt words of inheritance, provided there were other expressions to show the testator's intention to confer a fee, yet, prior to the New Wills Act, a long train of judicial decisions had established that a mere devise of a house or land would not suffice to indicate that intention, but would confer only an estate for life (*u*). Thus, if I were seised *in fee* of a house at A., and devised the same to B., adding either the words *and his heirs*, or equivalent words, expressive of an intention that he should take my whole estate therein, the house would pass to him, in either case, in fee; but if I devised to him such house, without adding *and his heirs*, or using such other equivalent words as above mentioned,

(*s*) Vide sup. p. 593. See Lomax *v.* Holinden, 1 Ves. sen. 295; Pow. Dev. 307, (n.), by Jarman; King *v.* Bennett, 4 Mee. & W. 36.

(*t*) 7 Will. 4 & 1 Vict. c. 26, s. 24. See O'Toole *v.* Browne, 3 El. & Bl. 572; Castle *v.* Fox, Law Rep., 11 Eq. Ca. 542; Everett *v.* Everett, 6 Ch. D. 122.

(*u*) Vide sup. pp. 240, 606. See Pickwell *v.* Spencer, Law Rep., 6 Exch. 190.

he would take an estate in it for his life only (*x*). This rule had always given much dissatisfaction, as establishing a construction contrary to that which common sense presumes to be the real intention of the party (*y*); and by 7 Will. IV. & 1 Vict. c. 26, s. 28, it has accordingly been provided, "that where any real estate shall be devised to "any person without any words of limitation, such devise "shall be construed to pass the fee simple, or other the "whole estate or interest which the testator has power to "dispose of by will, in such real estate, *unless* a contrary "intention shall appear by the will."

3. In devises to *trustees*, it had been a general rule prior to the New Wills Act, that though no words of inheritance were used in the limitation to them, yet they should take such an estate (even to the extent of the whole fee) as might be necessary to enable them to perform the purposes of the trusts; but the question often arose, whether in particular instances they would take the fee, or a less estate, and if the fee, whether it would be determinable or not when the trusts were satisfied (*z*). But by 7 Will. IV. & 1 Vict. c. 26, s. 30, a rule of construction is laid down, by which the subject is now governed; it being provided, "that where any real estate (other than or not being a "presentation to a church) shall be devised to any trustee "or executor, such devise shall be construed to pass the fee "simple, or other the whole estate or interest which the "testator had power to dispose of by will in such real "estate; unless a definite term of years, absolute or deter-"minable, or an estate of freehold, shall thereby be given "to him expressly, or by implication." And further (by

(*x*) See Roe *v.* Blackett, Cowp. 235; Silvey *v.* Howard, 6 Ad. & El. 253; Doe *v.* Fawcett, 3 C. B. 274; Lloyd *v.* Jackson, Law Rep., 1 Q. B. 571. And see acc. per cur. Bolton *v.* Bolton, Law Rep., 5 Exch. 152, citing Jarman on Wills, vol. ii. p. 247, 3rd ed.

(*y*) Denne *v.* Page, 11 East, 605, n.

(*z*) See Doe *v.* Ewart, 7 Ad. & El. 666; Doe *v.* Edlin, 4 Ad. & El. 582; Barker *v.* Greenwood, 4 Mee. & W. 429; Adams *v.* Adams, 6 Q. B. 860.

sect. 31), "that where any real estate shall be devised to a "trustee, without any express limitation of the estate to "be taken by such trustee; and the beneficial interest "in such real estate, or in the surplus rents and profits "thereof, shall not be given to any person for life—or "such beneficial interest shall be given to any person for "life, but the purposes of the trust are to continue beyond "the life of such person—such devise shall be construed to "vest in such trustee the fee simple, or other the whole "legal estate which the testator had power to dispose of "by will, in such real estate; and not an estate determin-"able when the purposes of the trust shall be satisfied."

4. If, in the interval between the execution of a will and the death of the testator, one of the objects of his bounty should die, the devise will, by the general rule of law, *lapse*, that is, fail, and take no effect; and this, though the devise was to the devisee and *his heirs*, or to him and *the heirs of his body*; and the subject-matter of it will be considered as not disposed of by the will (*a*). This rule, until the New Wills Act, applied to all cases without distinction; but where an *entailed* estate had been given to one who died and left children, it was attended with peculiar hardship; for if there were a devise to A. and the heirs of his body, and he died before the testator, the gift was void, even though he left issue (*b*). So if a testator gave his property among his own children, and one of them died before him, leaving issue, such issue would take nothing under the will, though the probability was, that this consequence could not have been intended. It is true that a testator had it always in his power to make a new disposition in favour of the children of a deceased devisee; but either from negligence or ignorance of the law, or from other accidental causes, this was often

(*a*) It will be remembered that a gift (whether by devise or by deed) in fee or in tail confers no distinct estate on the *heirs* or *issue* of the donee (vide sup. p. 334).

(*b*) See the 4th Real Property Report, pp. 73, 74.

omitted; and an alteration of the law itself, as applicable to cases of this description, was therefore thought desirable. The 7 Will. IV. & 1 Vict. c. 26, s. 32, has accordingly provided, "that where any person to whom any real estate "shall be devised for an estate tail, or an estate in *quasi* "entail, shall die in the lifetime of the testator, leaving "issue who would be inheritable under such entail, and "any such issue shall be living at the time of the death of "the testator—such devise shall not lapse, but shall take "effect as if the death of such person had happened imme- "diately after the death of the testator, unless a contrary "intention shall appear by the will." And further (by sect. 33), "that where any person, being a child or other "issue of the testator, to whom any real or personal estate "shall be devised or bequeathed for any estate or interest "not determinable at or before the death of such person, "shall die in the lifetime of the testator, leaving issue, "and any such issue of such person shall be living at the "time of the death of the testator,—such devise or bequest "shall not lapse, but shall take effect as if the death of "such person had happened immediately after the death "of the testator, unless a contrary intention shall appear "by the will" (*c*). In addition to which enactments, and in connection with the subject of lapse, we may notice this further provision (sect. 25), introductory of a new rule, in cases where a lapse occurs,—"that unless a contrary "intention shall appear by the will, such real estate or in- "terest therein as shall be comprised, or intended to be "comprised, in any devise in such will contained, which "shall fail or be void by reason of the death of the de- "visee in the lifetime of the testator, or by reason of such "devise being contrary to law, or otherwise incapable of "taking effect, shall be included in the *residuary devise* (if "any) contained in such will" (*d*).

(*c*) The "issue" left may be the *grandchild* of the devisee or legatee. (See Re Parker, 1 Swab. & Trist.

(*d*) The rule of law before statute passed was different as to

5. Under a devise by a testator, having leasehold estate only,—of "all my lands and tenements,"—a lease for years has been always allowed to pass, for there would otherwise be nothing for the will to operate upon. But this being considered as the only reason for such a construction, it was, on the other hand, prior to the New Wills Act, a general rule, that if a testator, using such words, had lands in fee, as well as leaseholds, at the time, the lands in fee only would pass (*e*). It is now, however, provided by 7 Will. IV. & 1 Vict. c. 26, s. 26, "that a devise of the "land of the testator, or of the land of the testator in any "place, or in the occupation of any person mentioned in "his will, or otherwise described in a general manner, and "any other general devise which would describe a cus- "tomary copyhold or leasehold estate, if the testator had "no freehold estate which could be described by it—shall "be construed to include the customary copyhold and "leasehold estates of the testator or his customary copy- "hold and leasehold estates, or any of them, to which such "description shall extend, as the case may be, (as well as "freehold estates,) unless a contrary intention shall appear "by the will" (*f*).

6. In like manner, where a party, having an *estate* in lands (which he is consequently competent to devise), is also entitled, by virtue of a *power* conferred on him for the purpose, to appoint other lands by his last will and testament, it was the rule, prior to the New Wills Act, that a general devise of his lands would operate only on those in which he had the estate, and would not affect those subject to the power; though it was otherwise if he expressly referred to the power, or if it appeared by other circumstances (as

real estates, but the same as to personal. (See Doe *v.* Underdown, Willes, 293.)

(*e*) See Rose *v.* Bartlett, Cro. Car. 293; Doe *v.* Williams, 1 H. Bl. 25; Thompson *v.* Lawley, 2 Bos. & Pul. 303; Knight *v.* Selby, 3 Man. & Gr. 92; Parker *v.* Merchant, 5 Man. & Gr. 498; Doe *d.* Dunning *v.* Cranstoun, 7 Mee. & W. 1.

(*f*) See Wilson *v.* Eden, 5 Exch. 752; Prescott *v.* Barker, Law Rep., 9 Ch. App 174.

by his having no estate for the will to work upon), that he intended the subject of the power to pass (*g*). And such is still the rule where the power is special, and to be exercised only in favour of particular individuals or classes of persons; but where it is general, and enables the testator to appoint to any person that he pleases, (which amounts in substance to an ownership,) the law is now altered by the New Wills Act; for it is provided by the 7 Will. IV. & 1 Vict. c. 26, s. 27, "that a general "devise of the real estate of the testator, or of the real "estate of the testator in any place, or in the occupation "of any person mentioned in his will, or otherwise de-"scribed in a general manner,—shall be construed to "include any real estate or any real estate to which such "description shall extend (as the case may be), which he "may have power to appoint in any manner he may think "proper; and shall operate as an execution of such power, "unless a contrary intention shall appear by the will" (*h*).

7. By a rule of legal interpretation, at variance with the common apprehension of mankind, and founded upon reasons of a purely technical description, it had long been settled law, that the words *dying without issue*, (as where an estate of freehold or leasehold was devised to A., and *upon his dying without issue*, then over to B.,) in general imported an *indefinite* failure of issue; that is, a failure not merely at the death of the party whose issue were referred to, but at any subsequent period, however remote (*i*). But by the New Wills Act, such words were

(*g*) See Denn *v.* Roake, 5 Barn. & Cress. 731.

(*h*) The same section also contains a similar provision as to appointments of *personal* estate. As to the construction of the word "estate" in a devise, see Sanderson *v.* Dobson, 1 Exch. 141.

(*i*) See Fearne by Butler, pp. 478, 480; Doe *v.* Taylor, 10 Q. B. 718; Gee *v.* Mayor of Manchester, 17 Q. B. 737, Foster *v.* Hayes, 4 Ell. & Bl. 717; Bamford *v.* Lord, 14 C. B. 708; Bliss *v.* Smith, 2 H. & N. 105. It is to be observed, however, that such words received the opposite construction, if accompanied by any other expression tending to limit the failure of issue to the time of the party's death; and the law admitted such a construction much more readily, in

for the [illegible] a more natural exposi[illegible]; it being enacted by [illegible] IV. & 1 Vict. c. 26, s. 29, "that, in any devise or bequest of real or personal "estate, the words 'die without issue,' or 'die without "leaving issue,' or 'have no issue,' or any other words "which may import either a want or failure of issue of "any person in his lifetime or at the time of his death, or "an indefinite failure of his issue,—shall be construed to "mean a want or failure of issue in the lifetime or at the "death of such person, and not an indefinite failure of his "issue, unless a contrary intention shall appear by the "will, by reason of such person having a prior estate tail, "or of a preceding gift, being (without any implication "arising from such words) a limitation of an estate tail to "such person or issue, or otherwise" (*k*). It is, however, added, that this provision shall not extend "to cases where "such words as aforesaid import if no issue described in a "preceding gift shall be born, or if there shall be no issue "who shall live to attain the age or otherwise answer the "description required for obtaining a vested estate by a "preceding gift to such issue."

IV. [As to the operation of a devise in conveying and limiting real estate, a will, in regard to its operation on such estate, is considered by the courts not so much in the nature of a testament, as of a *conveyance* declaring the uses to which the land shall be subject (*l*); with this difference, however, that in other conveyances the *subscription* of the witnesses is not, in all cases, essential to the validity of the deed (*m*), though it is a prudent precaution (and one which in practice is invariably observed), in order to assist

the case of a bequest of a term of years, than in that of a devise of the freehold. (Fearne by Butler, p. 471; Doe *d.* Cadogan *v.* Ewart, 7 Ad. & El. 648.)

As to the cases to which the above provision is intended to apply, see Dawson *v.* Small, Law Rep., 9 Ch. App. 651.

(*l*) Wyndham *v.* Chetwynd, Burr. 429.

(*m*) Vide sup. p. 497.

[their memory when living, and to supply their evidence when dead; but in a devise, such subscription is made absolutely necessary by statute, in order to identify a conveyance which in its nature can never be set up until after the death of the devisor.]

By a devise, estates may be limited with the same effect as by a conveyance operating under the Statute of Uses (*n*). Thus a man may effectually devise not only an estate in possession, (that is, in possession immediately on the death of the testator when the will first takes effect,) or in remainder, but also a freehold *in futuro*, or a fee upon a fee, or any estate in defeasance of a prior estate of freehold,—all which limitations (as we have seen) may be effectually made by way of executory use, though not in a conveyance at the common law (*o*). So a man may devise to his wife—as he may convey to her by way of use,—though his conveyance to her at common law was inoperative (*p*). His devise moreover in all these cases will be effectual though made by direct gift, and without reference to uses (*q*). Yet as a devise is considered to be in the nature of a conveyance declaring uses, so uses are often expressly introduced into them; and it has been the practice to introduce them in the same form as in conveyances under 27 Hen. VIII. c. 10. It has been doubted, however, whether that statute has any effect in the case of a devise (*r*): and though where uses are expressly and formally declared by the will, it may often be inferred that the testator had the statute in view, and intended the conversion of the use into legal estate, according to its known mode of operation; yet it is rather by force of his *intention*, than of the statute itself, that the legal estate, in such cases, would seem to pass.

A devise by which any future estate is thus allowed

(*n*) 2 Bl. Com. 334; Arthur *v.* Bokenham, 11 Mod. 154.

(*o*) Vide sup. p. 548.

(*p*) Ibid.

(*q*) Bl. Com. ubi sup.; Co. Litt. by Butler, 272 a, n. (1).

(*r*) Ib.; 1 Sand. Uses, p. 196.

to be limited contrary to the rules of the common law, is called an *executory devise* (*s*). And upon the same principle to which we had before occasion to advert, in the case of a springing or shifting use, it used to be a rule that no limitation capable of being considered as a remainder, shall ever be construed as an executory devise (*t*). All "executory devises" are also subject, like springing and shifting uses, to the rule against *perpetuity* (*u*). And therefore, until the New Wills Act, it was held that if a chattel (real or personal) were bequeathed to A., and upon his *dying without issue*, then to B., the limitation over to B. was void, as being too remote (*x*); for such words imported (as we have seen) an *indefinite* failure of issue (*y*). But in devises of the freehold, similarly worded, the objection of remoteness did not usually arise. For, in general, the law gave effect, in this case, to the limitation over, by considering the estate of the first taker as amounting, by implication, to an estate *tail;* a construction which was not admissible in the former case, by reason of there being no estate tail in a chattel (*z*); and the ulterior estate, by consequence, as a *remainder:* which, as it might always be barred by the recovery of the tenant in tail, did not fall within the rule against perpetuity. By the express provision, however, of the New Wills Act, the rule of interpretation as to the words *dying without issue*, on which the whole of these doctrines were founded, is now (as we have seen) itself abolished (*a*).

(*s*) Fearne by Butl. p. 386; 2 Bl. Com. 172.

(*t*) See Fearne by Butl. pp. 386, 394, 525; Doe *d.* Evers *v.* Challis, 20 L. J. (Q. B.) 113. The rule, however, must now be taken in connection with 40 & 41 Vict. c. 33, as to which vide sup. pp. 333, 550.

(*u*) 2 Bl. Com. 173, 334; Fearne by Butl. 430, 9th ed.; Co. Litt. by Butl. 271 b, n. (1), vii. 2. As to perpetuity, vide sup. p. 556. The period allowed for vesting is computed, in the case of a devise, from the death of the testator, not from the date of his will. (Ibid.)

(*x*) Fearne by Butl. p. 460; Doe *v.* Ewart, 7 Ad. & El. 648; Doe *v.* Duesbury, 8 M. & W. 531.

(*y*) Vide sup. p. 613.

(*z*) 2 Bl. Com. 398; vide sup. p. 282.

(*a*) Vide sup. p. 614.

With respect to the operation of a devise, it remains only to remark, that it vests in the devisee before and without entry an actual freehold by construction of law (*b*); being similar in this respect to a conveyance under the Statute of Uses; but different from a descent, which does not vest in the heir an estate complete for all purposes unless and until he has made entry on the lands descended (*c*).

(*b*) Co. Litt. 111 a. The devisee may, however, by an express act of dissent, waive the devise unless he has entered on the land (Doe *d.* Winder *v.* Lawes, 7 Ad. & Ell. 212).

(*c*) Vide sup. p. 430.

CHAPTER XXI.

OF EXTRAORDINARY CONVEYANCES—OR THOSE BY MATTER OF RECORD.

HAVING now completed our view of conveyances of the ordinary class, whether founded on common or statute law, we proceed next to the examination of *conveyances by matter of record* (*a*): which, being in use on particular and comparatively rare occasions, may therefore be designated as extraordinary conveyances. These are, 1. Private acts of parliament; and 2. Royal grants; both of which, as connected but slightly with the main body of the law, will be treated with brevity; and the rather, because our method will lead us to omit, for the present, any examination of the nature of the parliamentary and royal authorities on which they are respectively founded,—these subjects having both their appropriate places under the division of the work which relates to *public rights*.

I. Private *acts of parliament* have been resorted to as a mode of assurance more frequently in modern than in antient times (*b*). [For it may sometimes happen that, by

(*a*) The now abolished conveyances by way of fine and recovery, were also by matter of record; vide sup. p. 562.

(*b*) As to private acts of parliament, vide sup. p. 69. See 7 Will. 4 & 1 Vict. c. 83, as to the deposit of plans and documents in the case of *private bills;* 10 & 11 Vict. c. 69; 12 & 13 Vict. c. 78; 28 & 29 Vict. c. 27; 42 & 43 Vict. c. 17, as to taxation and costs on *private bills;* (as to which, see Swansea Canal Proprietors v. Great Western Railway Company, Law Rep., 5 Eq. Ca. 444.) See also 13 & 14 Vict. c. 21, s. 7, providing that all statutes passed after that Act shall be *public* Acts, unless the contrary shall be expressly declared therein: and 21 & 22 Vict. c. 78, as to administering oaths before committees of House of Commons on *private bills*.

[the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of resulting trusts, springing uses, executory devises, and the like artificial contrivances (*c*),—a confusion unknown to the simple conveyances of the common law,—so that it is out of the power of the courts to relieve the owner.] Or it may sometimes happen, that, by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power, (as letting leases, making a jointure for a wife, or the like,) which power cannot be given him by the courts even under the provisions of the Settled Estates Act, to which we have already adverted (*d*). [Or it may be necessary, in settling an estate, to secure it against the claims of infants, or other persons under legal disabilities; who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of the like kind, the transcendant power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the Restoration, by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as a noble historian expresses it (*e*), every man had raised an equity in his own imagination, that he thought was

(*c*) Blackstone (vol. ii. p. 344) also enumerates *contingent remainders*; but these *were* known to the common law. "They were probably "considered encroachments on the "common law," say the Real Property Commissioners (Third Rep. p. 23), "but were certainly allowed "by it. They were early attempts "to meet the contingencies of fa- "mily settlements, and were intro- "duced long before the Statute of "Uses."

(*d*) Vide sup. p. 266.

(*e*) Lord Clar. Contin. 162.

[entitled to prevail against any descent, testament, or act of law, and to find relief in parliament; which occasioned the king, at the close of the session, to remark, that the good old rules of law are the best security, and to wish that men might not have too much cause to fear that the settlements which they make of their estates shall be too easily unsettled, when they are dead, by the power of parliament (*f*).

Acts of this kind are, however, at present, carried on, in both houses, with great deliberation and caution; particularly in the House of Lords, where they are usually referred to two of the judges, to examine and report on the facts alleged, and to settle all technical forms (*g*). Nothing also is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter; unless indeed such consent shall appear to be perversely, and without any reason, withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the Act. And a general saving is constantly added at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named; though it hath been holden, that, even if such saving be omitted, the Act shall bind none but the parties (*h*).

A law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not

(*f*) Lord Clar. Contin. 163.

(*g*) Whenever a private bill, in the nature of an estate bill, is brought up from the Commons, and has not been previously settled in Chancery, it is referred by the House of Lords to be looked into by two of the judges. (May's Laws of Parl. pp. 820, 833, 8th ed.)

(*h*) See 8 Rep. 138 a; Godb. 171; vide Westby *v.* Kiernan, Ambl. 697; Provost of Eton *v.* Bishop of Winchester, 3 Wils. 483; Chapman *v.* Brown, 3 Burr. 1626.

[printed or published among the other laws of the session; and it hath been relieved against, when obtained by fraudulent suggestions (*i*).] Formerly, too, it was subject in every case to this further distinction, that though all public statutes are noticed by the court *ex officio*, no private one was entitled to judicial notice unless specially set forth and pleaded. And such is still the rule as to those passed up to 4th Feb. 1851, inclusive; but by 13 & 14 Vict. c. 21, s, 7, it was provided that every Act passed after that date shall be judicially taken notice of, unless the contrary be expressly provided and declared by the statute itself (*j*).

II. *Royal grants* are also matter of public record (*k*). [For, as St. Germyn says, the excellency of the sovereign is so high in the law, that no freehold may be given to, nor derived from the crown, but by matter of record (*l*). And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the royal grants must pass, and be transcribed, and inrolled: that the same may be narrowly inspected by the officers of the crown, who will inform the sovereign if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, offices, or aught besides, are contained in charters, or *letters-patent*, that is, open letters, *literæ patentes;* so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or

(*i*) See Richardson *v.* Hamilton, Canc. 8th January, 1773; M'Kenzie *v.* Stuart, Dom. Proc. 13th March, 1754; Biddulph *v.* Biddulph, 4 Cru. Dig. 549.

(*j*) As to all private Acts, it may be observed that up to 25 Hen. 8 they were enrolled on the rolls of parliament; but from that date until 32 Geo. 2, the *titles* only usually appear on the rolls. Under the existing practice, however, the titles are not now enrolled, but the Acts themselves are preserved at the Private Bill Office.

(*k*) Vide post, bk. v. c. xv.

(*l*) Doct. and Stud. b. 1, d. 8.

[addressed by the sovereign to all subjects of the realm. And therein they differ from certain other letters of the sovereign, which are also sealed with the great seal, but are directed to particular persons, and for particular purposes; which, therefore, not being proper for public inspection, are closed up, and sealed on the outside, and are thereupon called writs *close*, *literæ clausæ*, and are recorded in the *close rolls*, in the same manner as the others are in the *patent rolls*.]

The course of proceeding observed till of late with respect to the making out of a grant by letters-patent was in general as follows (*m*):—They were, first, to pass by *bill;* which was prepared by the attorney and solicitor-general, in consequence of a warrant from the crown, and was then signed (that is, superscribed at the top with the sovereign's own *sign manual*,) and sealed with the *privy signet*, which was always in the custody of the principal secretary of state; and then sometimes it immediately passed under the great seal, in which case the patent was subscribed in these words, "*per ipsam reginam*, by the queen herself" (*n*). Otherwise, the course was to carry an extract of the bill to the keeper of the *privy seal*, who made out a writ or warrant thereupon to the Chancery; so that the sign manual was the warrant to the privy seal, and the privy seal was the warrant to the great seal; and in this last case the patent was subscribed, "*per breve de privato sigillo*, by writ of privy seal" (*o*). But the practice as to grants by patent was greatly simplified by the statute 14 & 15 Vict. c. 82, which (after repealing a statute of 27 Hen. VIII. c. 11, on the subject) provided, that, in every case where any gift, grant or writing whatsoever to be passed under the great seal would have before required a bill from the office of the signet or of the privy seal, her Majesty may, by warrant under the royal sign manual, addressed to the lord chancellor, command him

(*m*) See 2 Bl. Com. 343.
(*n*) 2 Rep. 17 b.
(*o*) Ib.; 2 Inst. 555.

to cause letters-patent to be passed under the great seal according to such warrant; and that such warrant shall be prepared by the attorney or solicitor-general, and shall set forth the proposed letters-patent, and shall be countersigned by one of the principal secretaries of state, and sealed with the privy seal; and that it shall be lawful for the lord chancellor from time to time to frame such further regulations with respect to the passing of letters-patent under the great seal as to him shall seem expedient (*p*). Such is the general course as now established by that statute (*q*): but inasmuch as some letters-patent, writs, commissions or other instruments, might, before the statute, be passed under the great seal, by authority of the lord chancellor or otherwise, without passing through the offices of the signet and the privy seal; these are excepted, by an express proviso, from its operation. There are also some royal grants or appointments which only pass through certain offices, as the admiralty, the home office, or treasury, under the authority of a *sign manual* without the confirmation of either the *signet*, the *great* or the *privy* seal (*r*); and to these of course the statute has no application (*s*).

[The manner of a grant by the crown, (as above set forth,) does not more differ from that by a subject, than the *construction* of such grants when made. For, 1. A grant made by the crown, *at the suit of the grantee*, shall be taken most beneficially for the crown, and against the party: whereas the grant of a subject, is construed most strongly *against* the grantor (*t*). Wherefore it is usual to insert in the royal grants, that they are made, not at the suit of the grantee, but "*ex speciali gratiâ, certâ*

(*p*) By 40 & 41 Vict. c. 41, s. 4, *wafer* seals may be used in certain cases, and such impressions shall have the same validity as if the documents had passed under the great or privy seal.

As to a patent for an *invention*, see 15 & 16 Vict. c. 83.

(*r*) By 14 & 15 Vict. c. 82, s. 3, the offices of clerks of the signet and of the privy seal are abolished.

(*s*) As to commissions in the army, &c., see 25 & 26 Vict. c. 4.

(*t*) Vide sup. p. 503.

[*scientiâ, et mero motu reginæ* (*aut regis*);" and then they have a more liberal construction (*u*), as is also the case where they are made upon a valuable consideration (*v*). 2. A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant (*x*). Therefore in a grant of the profits of land for one year, free ingress, egress and regress, to cut and carry away those profits, are also inclusively granted (*y*); and so, by the antient law, if a feoffment of land was made by a lord to his villein, this operated as a manumission; for he was otherwise unable to hold it (*z*). But the grant of the crown shall not enure to any other intent, than that which is precisely expressed in the grant. 3. When it appears, from the face of the grant, that the crown is mistaken or deceived, either in matter of fact, or in matter of law, as in case of false suggestion, misinformation, or misrecital, of former grants; or if the royal title to the thing granted be different from what was supposed; or if the grant be informal; or if an estate be granted contrary to the rules of law;—in any of these cases the grant is absolutely void (*a*). For instance, if the crown grants lands to one and his *heirs male*, this is merely void; for it shall not be an estate tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue; neither is it a fee simple, as in common grants it would be, because it may reasonably be supposed, that the king meant to give no more than an estate tail (*b*); the grantee is therefore (if anything) nothing more than tenant at will (*c*). And to prevent deceits being practised on the sovereign, with regard to the value of the estate granted,

(*u*) Finch, L. 100, 10 Rep. 112.

(*v*) 6 Rep. 6 a.

(*x*) 1 Saund. by Wms. 323 a, n. (6).

(*y*) Co. Litt. 56 a.

(*z*) Litt. s. 206.

(*a*) Freem. 172. See Gledstanes v. Earl of Sandwich, 4 Man. & G. 995.

(*b*) Finch, 101, 102.

(*c*) Bro. Abr. tit. Estates, 33; tit. Patents, 104; Dyer, 270; Dav. 45.

[it was particularly provided by the statute 1 Hen. IV. c. 6, that no grant of the crown should be good, unless express mention was made of the real value of the lands in the grantee's petition for them (*d*).] As to the mode of proceeding for calling into question the validity of the crown's grant, it is by writ or action of *scire facias* at suit of the crown, issued at the instance, or at least with the sanction, of the attorney or solicitor-general; and any points of law or of fact arising thereon are determinable in the courts, where also the judgment is to be given and execution awarded (*e*).

Lastly, we may observe with respect to the *subject-matter* of royal grants, that—in connection with the provision now usually made by parliament, for support of the royal dignity—restrictions have been placed by legislative enactment on the alienation of the royal domains (*f*); the general effect of which (though subject to a variety of exceptions) is to make such alienations unlawful for any longer period than thirty-one years (*g*). But the private property of the queen, that is, any estate purchased out of the privy purse, or coming to her majesty, her heirs or successors, by descent or otherwise, from persons not being kings or queens of the realm, may be disposed of by her as freely as any estate belonging to a private individual (*h*).

And thus we have taken a transient view, in this and the four preceding chapters, of a very large and diffusive subject, the doctrine of common assurances as applied to the principal division of things real, viz. *land or corporeal*

(*d*) See 10 Geo. 4, c. 50, s. 125, as to the Woods and Forests Commissioners certifying to parliament, from time to time, the particulars of all grants of the crown lands; and 38 & 39 Vict. c. 87, ss. 65, 66, as to the registration of crown lands under that Act.

(*e*) See on this subject the provisions of 12 & 13 Vict. c. 102, s. 29, &c.

(*f*) See 1 Anne, c. 1; 10 Anne, c. 28; 10 Geo. 4, c. 50; 1 & 2 Vict. c. 65, s. 4.

(*g*) Vide sup. p. 448.

(*h*) See 39 & 40 Geo. 3, c. 88 (amended by 47 Geo. 3, sess. 2, c. 24); 4 Geo. 4, c. 18; 25 & 26 Vict. c. 37; 36 & 37 Vict. c. 61. See also Mr. Thomas's arrangement of Co. Litt. vol. i. p. 66, vol. ii. p. 606, where the law relative to crown grants is collected.

hereditaments of free tenure (*i*); and this survey concludes our observations on the *title* to them, or the means by which they may be reciprocally lost and acquired (*k*). And we have also in previous chapters considered the *estates* which may be had in them; with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connection of the persons entitled to hold them (*l*). What remains, then, of the law relative to the rights of property in things real in general, (exclusive of the wrongs and remedies to them appertaining,) is the learning relative to lands of *copyhold* tenure, and to *incorporeal hereditaments*; and to the first of these we shall accordingly proceed in the next chapter.

(*i*) Vide sup. p. 170.
(*k*) Vide sup. pp. 172, 384.
(*l*) Vide sup. pp. 229, 338.

CHAPTER XXII.

OF COPYHOLDS.

Our attention has been hitherto confined to hereditaments of free tenure; and these we have considered in reference to the estates that may be had in them, and the means by which those estates may be acquired or lost. But the reader will recollect, that lands may also be held by the base tenure of *copyhold;* a distinction of which some general notice has been already taken in a former chapter of this work (*a*). And we are now to examine copyhold lands in reference to the same considerations of estate and title, which have already engaged our attention in the course of the disquisition upon hereditaments of free tenure (*b*). As this, however, is in the nature of a mere variation upon that general scheme of real property, which has been already unfolded as largely as the nature of an elementary work permits, our notice of it may be compressed within proportionably narrow limits. It shall be directed chiefly to the following points: I. The general nature of copyhold estates. II. Certain incidents peculiar to those estates, and not applicable to such as are of free tenure. And in what we shall have occasion to say on this subject, we are to be understood as speaking of copyhold commonly so called; the particular species of antient demesne, and the rest, not requiring in the present work a more particular notice than has already been bestowed upon them (*c*).

(*a*) Vide sup. p. 214.
(*b*) Vide sup. pp. 229, 230.
(*c*) Vide sup. pp. 223 et

I. As to the general nature of these estates, and referring to what we before said of copyhold, we may collect from it, first, that it is in *manors* only that they are to be found; all copyholds being, from their nature, necessarily parcel of a district of that description. Secondly, that it is by the immemorial custom of the particular manor, that the nature of the copyholder's interest must always be regulated. In some manors, where the custom hath been to permit the heir to succeed to the ancestor, the estates are called copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life or years only (*d*); but though the interest of the copyholder may be thus in fee or for life, and consequently may partake of the nature of freehold in respect of the *quantity of estate*, it is nevertheless, for want of the remaining ingredient, (viz. that of free tenure,) no *freehold* (*e*). Indeed, in every case of copyhold, the law still distinguishes between the strictly legal, and the customary, estate; for as regards the former, it supposes the seisin and freehold of the land to be vested in the lord, of whose *demesnes* it is properly parcel; and the copyholder to be mere tenant at will (*f*); but as he is tenant at will *according to the custom*, that is, to hold in fee, or for life, or years, (as the case may be,) it considers him as having a customary estate to that extent (*g*); and one that is fixed and permanent in its nature, such as it is out of the power of the lord to defeat or encroach upon (*h*). In consonance

(*d*) 2 Bl. C. 97; 3 Real P. R. 14. It is to be observed, that if the custom has been to grant copyholds of inheritance, the lord may also grant a less estate; for, *omne majus in se continet minus.* (Co. Litt. 52 b.)

(*e*) Vide sup. p. 292.

(*f*) See Dearden *v.* Evans, 5 Mee. & W. 11; Duke of Portland *v.* Hill, Law Rep., 2 Eq. Ca. 765.

(*g*) It may be noticed that a copyhold estate, if of sufficient value, confers a right of voting at the election of members of parliament (30 & 31 Vict. c. 102, s. 5); and that copyholders are equally liable with freeholders to serve on juries (6 Geo. 4, c. 50; 33 & 34 Vict. c. 77).

(*h*) See Brown's case, 4 Rep. 21; Co. Cop. 5, 58; Litt. s. 92, Trespass. From these authorities it appears that copyholders were formerly

with the latter view, which assigns to the copyholder the character of a permanent tenant, he is deemed to owe fealty to his lord; which, as we have seen in a former place, is an obligation from which a mere tenant at will is always exempt (*i*). This complicated kind of interest, according to which the same man shall, with regard to the same land, be at one and the same time tenant in fee simple, and also tenant at the lord's will, seems to have arisen, in the manner formerly explained, from the nature of villenage tenure (*k*).

In the enumeration of the estates of which a copyhold may consist it will be observed, that we have not included estates *tail:* it being only by particular custom that copyholds are capable of being entailed (*l*). For the statute *De donis* has been held not to extend to lands of that tenure: from which it follows that a limitation to a man and "the heirs of his body," in a copyhold, will ordinarily create not an estate tail, but a fee simple conditional at common law (*m*).

Not only in regard to the quantity of interest, (as being in fee, for life, or for years,) but in regard also to the various modifications to which that interest may be subject, the nature of a copyholder's estate in general resembles that of an estate held in free tenure (*n*). But

ousted by their lords at pleasure. The reformation of this was, in the opinion of Chief Baron Gilbert, "by some positive law," (Gilb. Ten. 156, 161:) but it is generally supposed to have been gradual. Upon the whole, the origin and progress of this tenure are involved in singular obscurity; but the following notices of a very diligent investigator of the Year Books, deserve attention. As early as the fourth year of Edward the first, we find mention of *custumarii tenentes*. Towards the latter end of the reign of Edward the third, we find tenements per roll *solonque la volonte de seignour*; and in the reign of Henry the fifth the term *copyholders* occurs. (Hist. Eng. Law, by Reeves, vol. iii. p. 312.) And see Scriven on Copyholds, 6th ed., by Brown, pp. 12—14.

(*i*) Vide sup. p. 295, n.

(*k*) Vide sup. p. 214.

(*l*) Co. Litt. 60 b; 2 Bl. Com. 113.

(*m*) Doe v. Clark, 5 B. & Ald. 458; vide sup. pp. 240, 241.

(*n*) Co. Cop. 110; Gilb. Ten. 258; 2 B. & Ad. 440.

as to this, there are some exceptions. Thus,—as to estates in dower and by the curtesy,—it is laid down that copyholds are not, of common right, subject to either of these incidents (*o*); though they may each obtain, and in fact do very frequently obtain (the former under the name of *free-bench*), by the special custom of particular manors (*p*). And to this we may add, that as the mode in which copyholds are conveyed—of which we shall speak hereafter (*q*) —differs from any of those which are applicable to freeholds; so the limitation of an estate, in the former, is free from some of the restraints imposed by the ordinary rules of the common law, in the case of the latter. Thus in a conveyance of a copyhold estate *inter vivos*, though no assistance can be here derived from the Statute of Uses (*r*), —yet an estate in fee or for life may be limited *in futuro;* or a fee may be limited upon a fee; or a man may convey to himself, or to his wife (*s*). And a copyhold has been always capable, in the manner hereafter mentioned, of alienation by will; in which all the above modes of limitation are allowed with as much freedom as in the case of a devise of freehold.

II. Next, as to the incidents of a copyhold estate, in which it differs from one of free tenure; and these regard, first, the estate itself, and, secondly, its title or manner of acquisition.

First. As to the estate itself, a copyholder, even where his interest is in fee, has no right (except in particular manors where it may be warranted by a special custom) to commit *waste*,—for example, to cut down timber unless

(*o*) As to *dower*, vide sup. p. 267; as to *curtesy*, sup. p. 264. See 4 Rep. 22 a, where Sir E. Coke gives as a reason, that copyhold lands though *descendible* by custom, nevertheless do not possess all the other collateral qualities of estates of inheritance *simpliciter*.

(*p*) Co. Cop. 110, 111; Gilb. Ten. 161.

(*q*) Vide post, p. 635.

(*r*) Ibid.

(*s*) Boddington *v.* Abernethy, 5 B. & C. 782; Co. Cop. 81. As to the rules on these points in respect of *freeholds*, vide sup. pp. 546, 548,

for reasonable botes or estovers (*t*), or to dig for minerals (*u*);—for the law considers him, in these respects, in the light of a tenant at will. And yet this restriction is attended with no corresponding benefit to the lord; for the law does not allow him (unless there be a special custom for the purpose) to enter on the land to take the timber or minerals to his own use, without the consent of the copyholder; whose possession, though in strictness a tenancy at will, is nevertheless protected from all invasion (*v*). By such waste, and by many other acts of a wrongful kind,—such as an alienation in fee, or for life, by a common law mode of conveyance proper to freehold, and not applicable to a base tenure—a demise for more than one year, without the lord's licence—a refusal to perform the proper services,—or a disclaimer of his tenancy in open court,—the copyholder forfeits his estate to the lord (*y*).

Moreover the copyholder is ordinarily subject to *quit rents* and *fines*, and, sometimes, to *heriots*. The nature of a "quit rent" will be noticed in the following chapter, when we shall have occasion to consider the subject of *rent* in general (*z*). "Fines" are (as formerly explained) payments due, by the custom of most manors, to the lord, upon every descent or alienation of a copyhold tenement (*a*); and they accrue by force of the *admittance* to which we are about presently to refer more at large; but are not in general allowed to a larger amount than two years' improved value of the land, after deducting the quit rent (*b*).

(*t*) As to these, vide sup. p. 256.

(*u*) See Doe *v.* Wilson, 11 East, 56; Gilb. Ten. 235; Duke of Portland *v.* Hill, Law Rep., 2 Eq. Ca. 765.

(*v*) Whitechurch *v.* Holworthy, 4 Mau. & Sel. 340; Lewis *v.* Brentwate, 2 Barn. & Adol. 438; Phillips *v.* Hudson, Law Rep., 2 Ch. 243.

(*y*) 1 Watk. Cop. 326; 2 Bl. Com. 284; Scriven on Copyholds, 6th ed., by Brown, pp. 178–185; where a variety of acts which occasion a forfeiture are enumerated. And see Dimes *v.* Grand Junction Canal Company, 9 Q. B. 469.

(*z*) Vide post, p. 676.

(*a*) Vide sup. p. 222. As to fines formerly payable on alienation, &c. by tenant of lands of *free tenure*, vide sup. pp. 177, 209.

(*b*) As to the liability of *remaindermen* to pay fines, see Dean of Ely *v.* Caldecot, 8 Bing. 439; Phypers *v.*

In the case of "tenants in common" this fine is paid apportionably—that is, each pays a separate fine according to his share (*c*); but "joint tenants" and "co-parceners" pay a single fine for all (*d*). And the case of joint tenants is an exception to the general rule as to amount; for, on their admittance, the course is to allow two years' value for the first life, half of that on the second, and half of that last sum on the third; and so according to this descending series, whatever may be the number of tenants (*e*). For as such tenants are entitled to succeed each other by mere survivorship, and without a new admittance, (without which, no new fine could be due,) the application of the general rule to this case would operate unfairly on the lord. With respect to "heriots" (of which we have already taken some notice) they also are a tribute to the lord of whom a tenement is held; and they are usually divided into two sorts, heriot service, and heriot custom (*f*). The former are such as are due upon a special reservation in a grant or lease of lands; but they do not usually occur, except where they form part of the services by which some *particular* tenement within the manor has been held from time immemorial, and which may therefore be supposed to have been reserved by the grant of it originally made. Heriots, *i.e.*, heriot custom, on the other hand, arise upon no special reservation whatsoever, but depend merely upon custom; being founded on a *general* usage within some manor, from time immemorial: as that every tenement

Eburn, 3 Bing. N. C. 250; Garland *v.* Aston, 3 H. & N. 390. As to fines and fees payable by a person admitted under *several titles*, Traherne *v.* Gardner, 5 Ell. & Bl. 913. As to fees payable to stewards of manors on *compulsory* alienations, Cooper *v.* The Norfolk Railway Company, 3 Exch. 546. As to *double* fines, see Paterson *v.* , Law Rep., 2 Eq. Ca. 31.

(*c*) See Queen *v.* Manor of Everdon, 16 L. J. (Q. B.) 18; Queen *v.* Eton College, 8 Q. B. 526.

(*d*) Burt. Compend. 433; R. *v.* Manor of Bonsall, 3 B. & Cress. 175. See Douglas *v.* Earl of Dysart, 10 C. B., N. S. 695.

(*e*) Wilson *v.* Hoare, 2 Barn. & Adol. 350; S. C. 10 Ad. & El. 236; Sheppard *v.* Woodford, 5 Mee. & W. 608.

(*f*) 2 Bl. Com. 422.

within the manor has always paid, under certain circumstances, a heriot to the lord (*g*). A heriot may be due either from the free (*h*) or from the copyhold tenant of a manor (*i*); and it may accrue either in respect of the death or alienation of the tenant; but it is claimed more ordinarily in respect of the death (*k*). [It is sometimes the best live beast, *averium*, of which the tenant dies possessed (*l*), sometimes the best inanimate good, under which a jewel or piece of plate may be included; but it is always a personal chattel, which immediately upon the death of the tenant who was the owner of it, being ascertained by the option of the lord, becomes vested in the lord as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a *feme covert*, no heriot can (or originally could) be taken; for she can (or originally could) have no ownership in things personal (*m*). In some places there is a customary composition in money, —as ten or twenty shillings,—in lieu of a heriot; by which

(*g*) Vide sup. p. 221. Heriots are of great antiquity, being mentioned in England as early as the time of Edgar. (Hallam's Mid. Ages, vol. ii. p. 416, cites Selden's Works, vol. ii. p. 1620.) Blackstone (vol. ii. p. 423) observes, that we find in the laws of Canute, c. 69, the several *heregeates* specified which were then exacted by the king, from the highest *eorle* down to the most inferior *theyne* or landholder; and that these consisted for the most part in arms, horses, and habiliments of war, which the word itself, according to Spelman, signifies. But the heriot of the villein, unlike that of the military tenant, was generally some beast used for the purposes of agriculture. As to heriots, see Lord Zouche *v.* Dalbiac, Law Rep., 10 Exch. 172.

(*h*) By 21 & 22 Vict. c. 94, s. 7, either the lord or the tenant is now enabled to cause a heriot, payable by a freeholder (or customary freeholder) of the manor, to be extinguished, and the lands, thereto, enfranchised. As to heriots payable by the freeholders of a manor, see Damerell *v.* Protheroe, 10 Q. B. 20; Scriven on Copyholds, 6th ed., by Brown, p. 228.

(*i*) Bl. Com. ubi sup.

(*k*) 2 Watk. Cop. 135, 145.

(*l*) See Bract. l. ii. c. 36, s. 9. According to Blackstone (vol. ii. p. 424), the gift was in its origin only *voluntary*; and he relies on Bracton, and also on the opinion of Fleta and Britton. The expression of Bracton is, "*magis fit de gratiâ quam de jure.*"

(*m*) Hob. 69.

[the lord and tenant are both bound, if it be an indisputably antient custom; but a new composition of this sort will not bind the representatives of either party (*n*).] And it is further to be remarked, that if the tenement should happen to be at any time divided into distinct shares, either by becoming vested in tenants in common, or by alienation of parcel, in severalty, the heriot is *multiplied* accordingly (*o*); though upon the subsequent re-union of the parts in a single owner, the multiplication (at least in the case of a tenancy in common) ceases (*p*).

A copyhold estate, while subject to particular burthens, enjoyed on the other hand, until a comparatively recent period, some exceptional immunities. For it was not assets in the hands of the heir or devisee; and was consequently exempt, after the tenant's death, from the claims of his creditors (*q*); nor could any part of it be taken in execution, even during his life, upon an *elegit* (*r*). But this anomaly is now substantially rectified; for by 3 & 4 Will. IV. c. 104, a man's copyhold or customaryhold estate (not charged with or devised subject to the payment of his debts) was made, equally with his freeholds, *assets in equity* in the hands of his personal representatives (*s*); and by 1 & 2 Vict. c. 110, s. 11, it was made equally liable with freeholds to be seized in execution under an elegit (*t*).

In order to complete our general view of the copyhold estate, we must also recollect that it is capable, as we have elsewhere noticed, of *enfranchisement*, or conversion of the

(*n*) Co. Cop. s. 31; Parkin *v.* Radcliffe, 1 Bos. & Pul. 282; Croome *v.* Guise, 4 Bing. N. C. 148.

(*o*) 2 Watk. Cop. 149, 159; see Garland *v.* Jekyll, 2 Bing. 273.

(*p*) See Attree *v.* Scutt, 6 East, 476; Garland *v.* Jekyll, 2 Bing. 273; Holloway *v.* Berkeley, 6 Barn. & C. 2; Queen *v.* Manor of Everdon, 16 L. J. (Q. B.) 18. On alienation by several *joint tenants*, a single heriot only is due; see Padwick *v.* Tyndale, 1 E. & E. 184.

(*q*) 4 Rep. 22 a; 1 Watk. Cop. 224. As to assets, vide sup. p. 432.

(*r*) 2 Eq. Ca. Ab. 226, pl. 6; 1 Watk. Cop. 224. As to *elegit*, vide sup. p. 309; post, bk. v. c. x.

(*s*) Vide sup. p. 434.

(*t*) Vide sup. p. 309. As to the effect of bankruptcy or liquidation in reference to copyhold estates, vide post, bk. II. pt. II ch. 6.

base tenure into free (*u*); and that, either by a conveyance by the lord to the tenant of the freehold estate in the copyhold premises, or by a release of the seignorial rights (*x*); the effect in either case being, that the tenant thereafter no longer holds of the lord of the manor, but of him of whom that lord held, and by the same free tenure (*y*): from which this consequence also follows, that the tenement is discharged from all copyhold burthens to which it was before subject; and also divested (in general) of all copyhold rights (for example, that of common) to which it was before entitled (*z*).

Secondly. The incidents of copyhold in regard to its title or manner of acquisition, are in some respects the same with those of freehold; and particularly as regards the mode of descent: though this is much varied by the special customs of particular manors (*a*). There are, however, many incidents of a peculiar kind; and these, in general, result from the fundamental idea before remarked upon, that the interest of the copyholder is in strictness no more than a tenancy at will. Considered as such, it would be wholly incapable of direct alienation, for that would be a determination of the will (*b*); and therefore to this day, the attempt to transfer a copyhold, either for an estate of inheritance or for life, by any of those direct methods which are applicable to a freehold estate, is (as already remarked) in general attended with no other effect but to occasion a forfeiture to the lord (*c*). Yet, by the lord's *licence*, the copyholder may demise for a term of years (*d*); and, even without his licence, for a single year;

(*u*) Vide sup. p. 221.
(*x*) 1 Watk. Cop. 362.
(*y*) Ib. 367.
(*z*) 3 Real P. R. 17; 1 Watk. Cop. 368.
(*a*) Vide sup. p. 222.
(*b*) Vide sup. p. 292.
(*c*) Vide sup. p. 631.
(*d*) 1 Watk. Cop. 302; Scriven on Copyholds, 6th ed., by Brown, pp. 178, 193. But he cannot convey, by an ordinary deed, in fee, or for *life*, even with licence. (2 Watk. Cop. 119.) It may here be remarked, that the facilities for making leases of "settled"

and custom and the indulgence of the law, which favours liberty, also allow him to exercise a substantial, though indirect, right of alienation to any extent whatever, whether in fee, for life, or for years, under colour of a *surrender* of his interest to the lord, and an *admittance* or grant by the latter, *de novo*, to the tenant's nominee; such admittance being attended with those ceremonies of investiture, which marked in former days the original donation of a fief (*e*).

The nature of a surrender and admittance is, in a general point of view, and according to the custom of most manors, as follows: [the tenant comes to the steward of the manor, either in court (*f*), or, if the custom permits, out of court, or else to two customary tenants of the same manor, or to a single tenant provided there be also a custom to warrant it (*g*),—and then by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, or tenant, all his interest and title to the estate; in order that the same may be again granted out by the lord to such persons and for such uses as are named in the surrender, and as the custom of the manor will warrant (*h*). Upon such surrender, the lord, by his steward, accordingly grants the same land again to the surrenderor's nominee, who is usually, though rather improperly, called the surrenderee, to hold by the antient rents and customary

estates of lands of freehold tenure already referred to (sup. pp. 252, 258, 266, 279), are by 40 & 41 Vict. c. 18, s. 9, extended to settled estates of copyhold or customary tenure, (saving the lord's rights.) As to the proper *stamp* on a licence to demise, see 33 & 34 Vict. c. 97, *in sched.*

(*e*) Vide sup. p. 189.

(*f*) As to the customary court here referred to, vide sup. p. 220. By 4 & 5 Vict. c. 35, surrenders and admittances may now, in all cases, be made *out of* court.

(*g*) 1 Watk. Cop. 78.

(*h*) Such uses are not affected by the *Statute of Uses* (vide sup. p. 367), which Act has no application except to freeholds. (1 Watk. Cop. 100, 212; Rowden *v.* Maltster, Cro. Car. 42; Rigden *v.* Vallier, 2 Ves. 257.)

[services; and thereupon admits him tenant to the copyhold according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the same tenant the rod, or glove, or the like, in the name and as the symbol of corporeal seisin of the lands and tenements: upon which admission he pays a fine to the lord, according to the custom of the manor (*i*).]

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts, the surrender and the admittance: considered in reference, not to their form (for of that enough has been said) but to the doctrine and principles to which they are respectively subject.

1. [A "surrender" is rather a manifestation of the alienor's intention, than a transfer of any interest in possession (*k*). For until admittance of the surrenderee, the lord taketh notice of the surrenderor, as his tenant; and the surrenderor still receives the profit of the land to his own use, and shall discharge all services due to the lord (*l*). Yet the interest remains in him not absolutely, but *sub modo;* for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender;] and he is considered as a trustee for the surrenderee, who has an equitable interest capable of being devised or otherwise assigned (*m*). The latter also has a right to call upon the lord to admit him, and in the event of his refusal may compel him to do so by mandamus or other appropriate proceeding in the High

(*i*) 2 Bl. Com. p. 365. Blackstone adds that he "takes the oath of fealty." But in practice it is apprehended that this has become obsolete, the fealty being "respited." As to the stamp duty on surrender, see 33 & 34 Vict. c. 97, *in sched.* As to the costs of admittance, see Cole *v.* Jealous, 5 [illegible], 51.

In the absence of special custom the lord is not bound to accept a surrender by a deed burthened with trusts. (Flack *v.* The Master of Downing College, 13 C. B. 945.)

(*l*) Hence before admittance the lord can maintain no action, for the fine due in respect thereof, against the surrenderee. (Lord [illegible] *v.* Withers, 4 Ell. & Bl. 750.)

(*m*) 1 Watk. Cop. 102.

Court of Justice (*n*). But no estate whatever is vested in the surrenderee as *copyhold tenant*, before admittance. [If he enters without, he is, strictly speaking, a trespasser, unless the surrender should operate as a license to excuse the trespass; and if, on such entry, he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed as if by relation (*o*). For though he be admitted in pursuance of the original surrender, and thereby acquire afterwards a sufficient and plenary interest as absolute owner, yet his surrender to another previous to his own admittance is absolutely void *ab initio;* because, at the time of such surrender, he had but a possibility of an interest, and could therefore transfer nothing; and no subsequent admittance can make an act good which was *ab initio* void.

2. "Admittance" is the last stage or perfection of copyhold assurances; and considered in that light, it may either be an admittance upon surrender by the former tenant, or an admittance upon a descent from the ancestor. In both these the lord is used as a mere instrument: and as no manner of interest passes into him by the surrender or death of his tenant, so no interest passes out of him by the act of admittance; and the claim of the tenant who is admitted is solely under him that made the surrender, or under the ancestor (*p*). And, therefore, neither in the one case nor in the other is any respect had to the quality or quantity of the lord's estate in the manor. For it is immaterial whether he be tenant in fee or for years, or whether he be in possession by right or by wrong; since the admittances made by him shall not be impeached on account of his title, because they are

(*n*) See 2 Bl. Com. 369; Scriven on Copyholds, 6th ed., by Brown, p. 366; R. *v.* Manor of Bonsall, 3 Barn. & Cress. 175; The Queen *v.* Powell, 1 Q. B. 352; Doe *v.* Harrison, 6 Q. B. 631; Queen *v.* Denby, 22 L. J. (Q. B.) 39; Queen *v.* Lord Wellesley, 2 Ell. & Bl. 924.

(*o*) Doe *v.* Tofield, 11 East, 246, 251. As to a devise by the surrenderee, before admittance, see Matthew *v.* Osborne, 13 C. B. 919.

(*p*) 2 Bl. Com. 370, cites 4 Rep. 27; Co. Litt. 59.

[judicial, or rather ministerial acts, which every lord in possession is bound to perform (*q*).

Admittances, however, upon surrender differ from admittances upon descent, in this, that, by surrender, nothing beyond an equitable interest is vested in the surrenderee, before admittance; but, upon descent, the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the *homage*, that is, as one of the tenants present at the lord's court; nor maintain an action in the lord's court, as tenant; but to most intents the law taketh notice of him as a perfect tenant of the land, instantly upon the death of his ancestor (*r*). He may enter into the lands before admittance; may take the profits; may punish any trespass done upon the ground (*s*); may devise the land descended on him (*t*); may, upon satisfying the lord for his *fine* (*u*) due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine; and not so much necessary for the strengthening and completing of the heir's title. Hence, indeed, an observation might arise, that, if the benefit which the heir is to receive by the admittance is not equal to the charge of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be deprived of his fine. But to this we may reply in the words of Sir E. Coke (*x*)—"I assure myself, "if it were in the election of the heir to be admitted, or "not to be admitted, he would be best contented without "admittance; but the custom in every manor is in this "point compulsory. For either upon pain of forfeiture

(*q*) 4 Rep. 27; 1 Rep. 140.
(*r*) As to the admittance of a ..., vide post, p. 642.
(*s*) 4 Rep. 23.
(*t*) Right *v.* Banks, 3 Barn. & Adol. 644; Doe *v.* Wilson, 5 Ad. & El. 321; 7 Will. 4 & 1 Vict. c. 26, s. 3.
(*u*) Vide sup. p. 631.
(*x*) Co. Cop. s. 41

["of the copyhold, or of incurring some great penalty, the "heirs of copyholders are enforced in every manor to "come into court and be admitted according to the "custom, within a short time after notice given of their "ancestor's decease."] Accordingly (by the custom of most manors) if no person come in to be admitted in the place of a deceased tenant, the lord of the manor, after making due proclamation at three consecutive customary courts, may seize the land into his own hands *quousque*, that is, until some person claims to be admitted (*y*).

But though, in the case of an admittance upon surrender, no copyhold estate is vested in the surrenderee until he is admitted, and it is distinguishable in this respect from an admittance upon descent; yet it is material to observe, that even an admittance upon surrender, when made, has a retrospective relation, in point of time, to the surrender itself. And therefore if the surrenderor dies after the surrender, and before admittance, though his heir will take by descent in the interim, yet on the admittance of the surrenderee, the heir's estate will be defeated (*z*).

Such is, in general, the nature of a surrender and admittance, in the simplest form; and the only variations upon the proceeding, which we deem it material at present to notice, relate to a conveyance by way of mortgage. Here the surrender is made upon *condition* that the money remains unpaid at the time appointed; but in the meantime no admittance takes place; and if the money be then paid, the surrender not having been perfected by admittance, is void without further ceremony (*a*). Nor is it the

(*y*) 1 Watk. Cop. 290; Scriven on Copyholds, 6th ed., by Brown, pp. 114—117. See, for example, the case of Walters *v.* Webb, Law Rep., 9 Eq. Ca. 83; ib. 5 Ch. App. 531. As to the admittance of *infants*, *femes covert*, and *lunatics*, see 11 Geo. 4 & 1 Will. 4, c. 65; 16 & 17 Vict. c. 70, ss. 108—110; Dimes *v.* Grand Junction Canal, 9 Q. B. 469.

(*z*) 1 Watk. Cop. 103; and see Doe *v.* Hall, 16 East, 208. In the case of the death of the surrenderee before admittance, his devisee must pay two fines to the lord. (Londesborough *v.* Foster, 3 B. & Smith, 805.)

(*a*) As to mortgages in general, vide sup. p. 303.

usual course to complete the copyhold estate by admittance, even supposing the money to remain unpaid, unless the mortgagee wishes to take possession; but the conditional surrender constitutes the only security, and continues to do so, until the mortgage is satisfied, and entry of such satisfaction is made on the court rolls; after which the original title of the mortgagor is considered as remaining in full force (*b*).

The admittances of which we have hitherto spoken are those used to complete an inchoate title by surrender or descent. It is to be observed, however, that there is another kind of admittance, viz., that which is connected with an original voluntary grant from the lord himself, and not with any preceding surrender or descent (*c*). This occurs chiefly in the case where the lord has himself acquired the copyhold interest, in consequence of some escheat, forfeiture, descent, surrender to his own use, or other circumstance, so that the freehold and copyhold interest are united in his person (*d*); which produces an *extinguishment* of the copyhold (*e*). In such cases the lord may, if he thinks proper, notwithstanding the extinguishment of the former copyhold estate, grant the lands out *de novo* to hold by copy (*f*); but if he does this he is bound to observe the antient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold, which, as this tenure depends on immemorial usage, cannot be done. Thus, if a copyhold for life falls into the lord's hands and he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects (*g*); nor can he charge or encumber, in any way, the tenant's estate so granted (*h*).

(*b*) 1 Watk. Cop. 116, 117; Burt. Compend. 420.
(*c*) 2 Bl. Com. 370.
(*d*) 1 Watk. Cop. 36, 39.
(*e*) Ib. 359, 361, 423.
(*f*) Ib. 93, 361.
(*g*) Co. Cop. s. 41.
(*h*) 8 Rep. 63.

The lord may also, where there is a special custom in the manor to that effect, make grants of portions of the *waste*, to be held for the first time by copy of court roll (*i*); but a custom to grant out every part of the waste without restriction, would be illegal, as trenching too much upon the general common right of the tenants (*k*); and to the validity of the grant of any portion, the assent of the *homage* is, by the custom of some manors, essential (*l*).

Again, admittance may also take place in the case of a devise; for a copyhold estate is now as devisable by will as a freehold. Formerly copyholds were not directly devisable even when lands of freehold tenure had become so by virtue of the statutes of Hen. VIII. before mentioned (*m*). But when a man wished to devise a copyhold, the object was effected by the devisor, in his lifetime, making a surrender *to the use of his will;* which, upon his death, entitled the person, designated in such will as devisee, to be admitted (*n*); and, except by special custom, a devise without a previous surrender of this kind was inoperative (*o*). However, by 55 Geo. III. c. 192 (passed 12th July, 1815), every disposition made by will, by a person dying after the passing of that Act, was made as effectual *without* a surrender to the use of his will, as it would have been if such a surrender had taken place (*p*). And so by the New Wills Act, (repealing 55 Geo. III. c. 192, except as to wills made before 1st January, 1838,) it is provided that all the *real estate* of the testator may be devised; and under that description, all his copyholds,

(*i*) As to "the lord's waste" in a manor, vide sup. p. 215. As to *approving*, vide post, pp. 657, 658.

(*k*) 1 Watk. Cop. 35; see Lord Northwick *v.* Stanway, 3 Bos. & Pul. 346; The King *v.* Wilby, 2 M. & S. 509; Badger *v.* Ford, 3 B. & Ald. 153.

(*l*) As to this assent, see 4 & 5 Vict. c. 35, s. 9.

(*m*) Vide sup. p. 597.

(*n*) Co. Cop. s. 36.

(*o*) 1 Watk. Cop. 122; see Doe *v.* Bartle, 5 Barn. & Ald. 492; Cuthbert *v.* Lempriere, 6 M. & S. 158.

(*p*) See Doe *v.* Thompson, 7 Q. B. 897; Glasse *v.* Rich De G., M'N. & G. 659; *v.* Gardner, 5 Ell. & Bl.

though he should not have surrendered them to the use of his will, nor have even been admitted to them himself, are expressly included (*q*). It is, however, incumbent on the devisee to be admitted (as in the case of a descent) and pay to the lord, one or more fines as the case may be.

Copyhold lands may moreover pass by a conveyance under the Act for abolishing fines and recoveries, 3 & 4 Will. IV. c. 74 (*r*). In some manors an estate limited to a man "and the heirs of his body," might (prior to that statute) have been barred by a customary recovery, founded on a fictitious action in the lord's court, according to the analogy of a common recovery in the Court of Common Pleas (*s*); in others, such customary estate tail was capable of being barred by surrender (*t*). But by the statute in question it was enacted, that a disposition by tenant in tail of the legal estate in a copyhold, shall in every case be by surrender (*u*); subject to provisions as to the consent of the protector of the settlement (where there is one), analogous to those which the statute introduced in relation to the disentailing of freehold lands (*x*): but it is provided that such surrender (differing in this respect from a disentailing deed of freeholds) shall require no enrolment, otherwise

(*q*) 7 Will. 4 & 1 Vict. c. 26, s. 3. (See Garland v. Mead, Law Rep., 6 Q. B. 441.) This power of devise extends to a copyhold held *pur autre vie* (vide sup. p. 452).

(*r*) The provisions of this Act as to land held by copy of court roll, do not (it would seem) extend to land held as *customary freehold*. (R. v. Ingleton, 8 Dowl. P. C. 693.)

(*s*) Doe v. Dauncey, 7 Taunt. 674; 1 Watk. Cop. 161. As to a common recovery, vide sup. p. 571. If a fine or recovery of land held in antient demesne were levied or suffered in the Court of Common as though it were freehold, it might be reversed by a particular form of action brought by the lord, called a *writ of deceit*; and the land consequently restored to its former state of copyhold: but if the fine or recovery were not duly reversed, the tenure of the land would be thereby altered, and converted into *frank fee* or freehold. (2 Bl. Com. 368; and see 3 & 4 Will. 4, c. 74, s. 5; also, Scriven on Copyholds, 6th ed., by Brown, pp. 35—37.)

(*t*) Doe v. Dauncey, 7 Taunt. 678; 1 Watk. Cop. 178.

(*u*) 3 & 4 Will. 4, c. 74, s. 50.

(*x*) Sects. 40, 51, 52, 90.

than by entry on the court rolls (*y*). It is also enacted by the same Act, with respect to the copyhold of a *married woman* when not tenant in tail—for when she is so, her estate is to pass by surrender as before the statute, i. e. by the surrender of herself and husband, she being at the same time examined apart by the steward (*z*)—that she may by deed, acknowledged in such manner as therein directed, and executed with the concurrence of her husband, convey her estate, or extinguish any interest or power vested in her, as effectually as if she were a *feme sole;* though this enactment is expressly declared not to extend to her legal estate in any case in which the object of that provision could, before the passing of the Act, have been effected by a surrender (*a*).

The preceding remarks relate, it will be observed, to the manner of conveying the *legal* estate in copyhold lands. With respect to *equitable* interests in lands of this tenure, they do not in general pass by surrender, for none but the owner of the legal estate is tenant to the lord, nor consequently entitled to surrender (*b*); but by any ordinary mode of conveyance sufficient to pass an equitable interest in other cases: and a mere instrument in writing, signed as directed by the Statute of Frauds, will suffice (*c*). But as to equitable *estates tail*, and the equitable estates of *married women not tenants in tail*, it is provided by the Fine and Recovery Act, that they shall pass either by surrender or by a disentailing or other deed, attended with the same formalities in general which are prescribed by that statute in reference to a transaction affecting legal estates (*d*).

We have thus endeavoured to trace the principal features of the law of copyhold; one of the most unsatisfactory

(*y*) 3 & 4 Will. 4, c. 74, s. 54.

(*z*) See 1 Watk. Cop. 63; Kewley v. Ryan, 2 H. Bl. 344; Driver v. Thompson, 4 Taunt. 294.

(*a*) 3 & 4 Will. 4, c. 74, s. 77.

(*b*) 1 Watk. Cop. 60.

(*c*) Ib.; vide sup. p. 379.

(*d*) 3 & 4 Will. 4, c. 74, ss. 50, 53, 77, 90.

divisions (it must be owned) of the general fabric of our jurisprudence (*e*). It is obviously open to the censure of being an unnecessary and embarrassing variation upon the fundamental scheme of tenure; and it was justly remarked by the commissioners appointed in the ninth year of George the fourth to revise the law of real property, that where the complexity which must always belong to the legal institutions of a civilized country "is wantonly "aggravated by the admission of several concurring sys- "tems, serious mischiefs are likely to arise from the igno- "rance or forgetfulness of practitioners; and even of "judges, however carefully selected." Many specific inconveniences were also pointed out by the same learned persons, as incident to the nature of copyhold tenure; of which the principal appear to be, the multiplicity and uncertainty of the different manorial customs, the check to agricultural improvement occasioned by the state of the law with respect to timber and minerals,—the liability to fines—the numerous payments due to stewards on account of fees,—and the vexatious and oppressive character of heriots. The efforts of legislative reform have, however, since that report was made, been assiduously directed towards this branch of the law; and have resulted in certain statutes, viz., the 4 & 5 Vict. c. 35, 6 & 7 Vict. c. 23, 7 & 8 Vict. c. 55, 15 & 16 Vict. c. 51, 21 & 22 Vict. c. 94, 23 & 24 Vict. c. 59, and 31 & 32 Vict. c. 89, by which new regulations of great importance have been introduced (*f*). These Acts apply themselves to the following

(*e*) A Select Committee of the House of Commons, appointed to consider as to the enfranchisement of copyholds, expressed an opinion in their Report of 13th August, 1838, that this tenure is "a blot "on the juridical system of the "country;" and they cite the remark of Roger North in his Life of Lord Keeper Guildford, that "it "was somewhat unequal, when the "parliament took away the royal "tenures *in capite*, that the lesser "tenures of the gentry were left "exposed to as grievous abuses as "the former."

(*f*) By 21 & 22 Vict. c. 94, the Copyhold Act (16 & 17 Vict. c. 57) is repealed; and by 23 & 24 Vict. c. 59, s. 4, some of the enactments

objects: first, to give effect to agreements for the commutation of manorial burthens and restrictions, and to improve, in some other respects, the tenure itself; secondly, to facilitate the conversion of that tenure into freehold.

In promotion of these views the statutes establish a Board of "Copyhold Commissioners" (*g*); and then proceed to enact, that the future rents, fines, and heriots, and the lord's right in timber, and also (if so expressed) in mines and minerals, may in all cases be *commuted* by an agreement, which shall be compulsory on all parties interested in the manor, or in the lands held of the manor; provided the parties to such agreement be respectively interested in such manor and lands to the extent of three-fourths at least in value, and the number of the tenants be at least three-fourths of the whole: and also provided that all ecclesiastical and other corporations and patrons of livings, interested in such manner as mentioned in the Acts, be parties to the agreement; and that it be afterwards confirmed by the Copyhold Commissioners (*h*). The Acts also authorize commutation to be, in like manner, made between the lord of the manor and any one or more of his tenants, whatever may be the amount of their respective interests; so as to be binding (after confirmation by the commissioners) on those parties, and on all other persons connected with them in title: though, both in this case and in the former, notice is to be given to the persons next in remainder, reversion, or expectancy, of any estate of inheritance in the rights to be commuted, —not being parties to the agreement,—and such persons are permitted to urge before the commissioners

referred to in the text, are amended as to estates vested in the *universities*.

(*g*) 4 & 5 Vict. c. 35, s. 2. With this board, the Tithe Commissioners and the Inclosure Commissioners are now consolidated (see 14 & 15 Vict. c. 53; 25 & 26 Vict. c. 73; 41 & 42 Vict. c. 70); and to this board is also entrusted the execution of the Improvement of Lands Act, 1864 (27 & 28 Vict. c. 114). And see Settled Land Act, 1882.

(*h*) 4 & 5 Vict. c. 35, ss. 13, 22, 23.

any objection to the proposed arrangement (*i*). And after a commutation duly effected, the lands, although still remaining copyhold for most purposes, cease to be subject to any customary mode of descent; or to any custom relating to dower, freebench, or tenancy by curtesy, except as to persons married before the commutation took place: and become liable, in all that regards those matters, to the same law as lands held in free and common socage (*j*).

Besides these facilities for commutation, certain improvements of copyhold tenure are introduced into the above Acts. Thus, to remove doubts before existing on the subject, it is provided, that it shall be lawful for the courts to make partition of copyhold lands, as well as of lands of freehold tenure (*k*). And to obviate certain inconveniences previously attaching to the practice of surrenders, admittances and grants, it is enacted, that lords of manors, (or their stewards or deputy stewards,) may hold customary courts, though there should be no copyhold tenant at the time, or none should be present; and may grant lands to be held by copy, and also admit to lands to be held by copy, at any time or place (whether within or without the manor), and without holding a court (*l*). And whereas before these statutes it was in many cases necessary that a surrender, or other act *out* of court, should be afterwards *presented* in court by the homage, or tenants of the manor there assembled (*m*),—it is provided that every copy of a surrender, will or codicil delivered to the lord, steward or deputy, and every grant and admission, shall be forthwith entered on the court rolls of the manor; and that such entry shall be taken to be an entry in pursuance of a presentment: and that it shall not be essential

(*i*) 4 & 5 Vict. c. 35, s. 52.

(*j*) Sect. 79. Lands in Kent held on *gavelkind* are, however, excepted from the operation of the Copyhold Acts. (Sect. 80; 15 & 16 Vict. c. 51, s. 34.)

(*k*) 4 & 5 Vict. c. 35, s. 75.

(*l*) Before the Act, a customary court could not be held unless two copyholders at the least were present. (3 Real Property Rep. 20.)

(*m*) 1 Watk. Cop. 79, 80.

in any case to the validity of an admission, that a presentment should be made of the surrender, or other matter in consequence of which the admission was granted; with this proviso, however, that when, by the custom of any manor, the lord is authorized, by consent of the homage, to grant parcel of the waste to be held by copy, the consent of the homage assembled at a customary court, duly summoned and held according to the custom, shall still be necessary. And whereas by the custom of some manors, a licence from the lord to alienc is required, and in some of those cases lords were restrained, by the custom, from granting licences to their tenants to aliene their antient tenements, otherwise than by *enfranchisement*,—it is enacted that licences to aliene parcels may now be granted, and such alienation may be made accordingly (*n*).

With the view of facilitating *enfranchisement*, that is to say, the conversion of copyhold into freehold, the Copyhold Acts provide, in substance (for no minute detail can be attempted in this place), that, with the consent of the commissioners, it shall be lawful for the lord, whatever may be his interest, to enfranchise all or any of the lands holden of his manor; and that it shall be lawful for any tenant (whatever his interest), with the like consent, to accept such enfranchisement. And it is also enacted, that even independently and in the absence of any mutual agreement upon the subject, it shall be lawful for any copyhold tenant—other than one who holds only for life or lives or years, without right of renewal—or for any copyhold lord, to *require* and *compel* enfranchisement,—the amount, nature and particulars of the compensation for the manorial rights being ascertained and *awarded* (unless the parties can agree), under the direction of the copyhold commissioners (*o*). It is also provided, that the expense of a compulsory enfranchisement shall be

(*n*) See 1 Watk. Cop. 287, n. (*x*), ; 4 & 5 Vict. c. 35, s. 92.

(*o*) 15 & 16 Vict. c. 51, ss. 1, 7; 21 & 22 Vict. c. 94, s. 6. See Lingwood r. Gyde, Law C. P. 72.

borne by that party (whether the lord or the tenant) who shall have required the same (*p*); that upon every enfranchisement (whether compulsory or voluntary) being effected, the land shall become in all respects of freehold tenure (*q*), and cease to be subject to any particular custom whatever (*r*); but that, on the other hand, no compulsory enfranchisement shall compulsorily affect any right as to mines or minerals; or any right of fair or market; or in respect of game, fish, or fowl (*s*).

(*p*) 15 & 16 Vict. c. 51, s. 30. Such expenses may be charged on the manor or on the land enfranchised. (21 & 22 Vict. c. 94, s. 24.)

(*q*) See Brabant c. Wilson, Law ., 1 Q. B. 44, and see generally Scriven on Copyholds, 6th by Brown, pp. 284–298.

(*r*) 15 & 16 Vict. c. 51, s. 34. But as to gavelkind land in *Kent*, vide sup. p. 647, n.

(*s*) Sect. 48.

CHAPTER XXIII.

OF INCORPOREAL HEREDITAMENTS, CALLED ALSO "PURELY INCORPOREAL" HEREDITAMENTS.

incorporeal hereditament, which, according to the arrangement formerly laid down, now presents itself in its turn for consideration, is in its wider sense any possession or subject of property, whether real or personal, capable of being transmitted to heirs, and not the object of the bodily senses (*a*). But as there is scarcely any instance of property of this description amongst things personal (*b*)—for these almost invariably pass not to the heir, but to the executor or administrator,—the term incorporeal hereditament is, in effect, exclusively applied to the class of things *real;* and may consequently with propriety be defined as a right annexed to, or issuing out of, or exercisable within, an hereditament corporeal of that class (*c*). Thus a man may have a right of common of pasture for his cattle, or a right of way (both of which are incorporeal hereditaments) to be exercised over the land (which is

(*a*) Vide sup. p. 170. Its definition in Blackstone (vol. ii. p. 20) is "a right issuing out of a thing "corporate (whether real or per- "sonal), or concerning, or annexed "to or exercisable within the "same."

(*b*) An annuity descendible *to a man's heirs* is, however, an instance that occurs. (Co. Litt. 20 a.)

(*c*) Ib. 6 a, 20 b; Plowd. 170. "Incorporeal hereditaments so as to include *remainders and reversions* (as distinct from *estates in possession*) in corporeal hereditaments (Hale, Anal., 2 Sand. Uses, p. 39); and when the term "incorporeal hereditaments" is used in this last-mentioned sense, then the phrase "purely incorporeal hereditaments" is a convenient phrase to denote the incorporeal hereditaments which are the subject of consideration in this chapter.

corporeal) of another person. [As the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled; incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstract contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing or hereditament which produces them. Thus if we take the example of the right of feeding cattle in another's land, the grass, which is the fruit or product of the right, is doubtless of a corporeal nature; yet the right itself is a thing invisible—has only a mental existence, and cannot be delivered over from hand to hand.] Incorporeal hereditaments seem never to have been reduced to any regular system of division, nor is even a complete enumeration of them to be discovered in our books. But they consist for the most part—though, as we shall see hereafter, not exclusively—of rights *in alieno solo;* and these are generally distributable either into *profits*, such as the right to feed cattle, or to take fish, and the like; or *easements*, tending rather to the convenience than to the profit of the claimant, such as a right of way over the land of another man (*d*).

Incorporeal hereditaments include (amongst other species not requiring specific notice) *advowsons*, *tithes*, *commons*, *ways*, *watercourses*, *lights*, *offices*, *dignities*, *franchises*, *corodies*, *pensions*, *annuities*, and *rents* (*e*). But for the discussion of

(*d*) As to this distinction, see 2 & 3 Will. 4, c. 71; Robins v. Barnes, Hob. 131; Peers v. Lucy, 4 Mod. 365; Jac. Dict. "Easement," "Prescription;" Manning v. Wasdale, 5 Ad. & El. 758, 413; Bailey v. Appleyard, 8 Ad. & El. 167; Race v. Ward, 4 Ell. & Bl. 702. In the case last cited, it was held, the right of drawing off from a well or spring is is in the nature of an not a profit.

(*e*) 2 Bl. Com. 21. The ration in Hale's Analysis (p. 48), is as follows:—"*Rents*,

many of these subjects, places more distinctly appropriate will be found hereafter; and therefore in the present chapter we shall direct the reader's attention to the following heads only:—*commons*, *ways*, *watercourses*, *lights*, *franchises*, and *rents* (*f*).

I. *Common* (or right of common) is a profit which a man hath in the land of another, as to pasture beasts thereon, to catch fish, to dig turf, to cut wood, or the like (*g*). And the right derives its name from the community of interest which thence arises between the claimant and the owner of the soil, or between the claimant and other commoners entitled to the same right; all which parties are entitled to bring actions for injuries done to their respective interests—and that both as against strangers and as against each other (*h*). There are five sorts of common—common of pasture, common of piscary, common of turbary, common of estovers, and common in the soil.

1. Common of pasture. This is the principal and most frequent sort, being the right which a man has to feed his beasts on another's land; and it is either *appendant*, *appurtenant*, *because of vicinage*, or *in gross* (*i*).

tithes, commons, and other profits in alieno

(*f*) *Advowsons* and *tithes* will conveniently discussed as part of the general law relating to the church (vide post, bk. IV. pt. II. c. III.); while *offices* and (which indeed have in most no connection with the realty) will be more properly considered in that part of the work relating to the State or Government (vide post, IV. pt. I. cc. IX. X.). Such as is due to *annuities* will most advantageously bestowed upon them in connection with rents (vide post, p. 676): and with respect to *corodies* and *pensions* it will be sufficient briefly to state here that they were both, at the common law, species of allowances in money or food, payable by religious houses to the king, their founder, for the sustenance of his servants. (See Cowell's Inter. in tit.; F. N. B. f. 230, 233; 34 & 35 Hen. 8, c. 16.)

(*g*) 2 Bl. Com. p. 32. As to this definition, see Lloyd v. Earl Powis, 4 Ell. & Bl. 485.

(*h*) For the law on this subject, see Robert Marys's case, 9 Rep. 113; 1 Saund. by Wms. 346.

(*i*) Co. Litt.

Common of pasture *appendant* is the privilege belonging to the owners or occupiers of arable land holden of a manor, to put upon the wastes of the manor (usually called *commons*) their commonable beasts (*k*); that is, such beasts as are necessary either for the ploughing of land or for its manuring, viz. horses and oxen, cows and sheep (*l*). This is a matter of universal right (*m*); and it originally arose in this manner, that where a lord having a certain extent of waste ground, enfeoffed any one of a parcel of arable land to hold of his manor in socage, for services to be rendered, it was found necessary to allow the feoffee to have common of pasture in the waste ground, as incident to his tenancy; for he could not plough or manure his own land without beasts, nor could he on the other hand sustain the beasts upon it, while it was sown with corn (*n*). From this of course it follows, that it is only in respect of *arable* land that common appendant can be claimed (*o*); though it may be claimed by that name, as appendant to a farm in fact containing pasture at the present day; for the land shall be presumed (where there is usage to sustain the claim) to have been all originally arable (*p*). It follows, also, that common appendant is incapable of being created at the present day (*q*); for all manorial tenure must have had existence before the passing of the statute of *Quia Emptores*, in the eighteenth year of Edward the first (*r*).

Common *appurtenant*, which has been said to be fre-

(*k*) As to the waste of a manor, vide sup. p. 215.

(*l*) Year Book, 37 Hen. 7, 34, F. N. B. 180, 4 Vin. Ab. in tit. Com. (F). It is laid down in the books, that swine, goats, geese, and the like, are not commonable animals, as "not being necessary to "plough or compester the soil." (Bro. Ab. tit. Com. 13; Fin. Law, 56; Co. Litt. 122 a.) But as to *swine*, and the right of pannage for their support, see Chilton v. Corporation of London, Law Rep., 7 Ch. D. 562.

(*m*) 2 Bl. Com. 33; 1 Rol. Ab. 396, l. 44; Co. Litt. ubi sup.

(*n*) Tyringham's case, 4 37 a; Co. Litt. 122 a; r. Reeve, Willes, 231; Hist. Eng. Law, by Reeves, vol. i. p. 262.

(*o*) 1 Rol. Ab. 397, l. 28, 29.

(*p*) Bac. Ab. Common, (A. 1).

(*q*) 1 Rol. Ab. 396, l. 42; Year Book, 26 Hen. 8, 4 a.

(*r*) Vide sup. p. 234.

quently confounded with common appendant (*s*), ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable (*t*); as to hogs, goats, geese or the like (*u*). This, not arising from any natural propriety or necessity, like common appendant, is not therefore of general right, but can only be claimed by grant, or by the long usage of particular persons to enjoy the same (*x*); which latter title is commonly called a title by prescription; and is supposed by the law to be founded on a special grant or agreement originally made for this purpose.

[Common *because of vicinage*, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying naturally into the other's fields, without any molestation from either. This, indeed, is only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common: but if they escape and stray thither of themselves, the law winks at the trespass (*y*).] In close connection with this, and substantially of the same kind, is the right described in the books as *common of shack*—or the right of persons occupying lands, lying together in the same common field, to turn out their cattle

(*s*) See Bennett *v.* Reeve, Willes, 232.

(*t*) Sacheverill *v.* Porter, Cro. Car. 462; 1 W. Jones, 397, S. C.

(*u*) Vide sup. p. 653, n.

(*x*) Tyringham's case, 4 Rep. 36 b; Cowlan *v.* Slack, 15 East, As to title by prescription, vide post, pp. 688 et seq., where it will be explained *what* length of usage is sufficient to create a prescription.

(*y*) Co. Litt. 122 a. As to common *pur cause de vicinage*, see Heath *v.* Elliott, 4 Bing. N. C. 388; and Jones *v.* Robin, 10 Q. B.

after harvest to feed promiscuously in that field (*z*). Indeed, this kind of common, which in the beginning was but in the nature of a pasture "because of vicinage," and founded on the same reason (*a*), has now long since in many parts of the country insensibly changed its nature; and become, by the force of custom, a right so fixed, that even though the owner of any particular parcel should assume, merely on his own authority, to inclose his land in severalty, it would still continue subject to the antient rights of the intercommoners (*b*). In a case like this (which is of familiar occurrence in parts of the country where the land still lies in open field), the right would seem to be properly classed under the head of *common appurtenant* (*c*).

Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right,—as by a parson of a church, or the like corporation sole (*d*). This is a separate inheritance, entirely distinct from any other landed property vested in the person to whom the common right belongs.

Common of pasture, of whatever kind, may, in respect of time, be either limited or unlimited; that is, may either be confined to particular seasons of the year, or last all the year round (*e*). As to the number of beasts to be turned on, the right is in general subject to restriction; for all commons (except those in gross) must be either claimed in respect of some number in particular, or at least in such manner as tends to limit the number, as for all cattle *levant* and *couchant* on the land to which the common is appendant or appurtenant; that is, for so many as the land is

(*z*) Corbet's case, 7 Rep. 5; Cheesman, 1 Barn. & Ald. 710.

(*a*) Corbet's case, ubi sup.

(*b*) Ibid.

(*c*) Lord Coke says, "it is by "custom altered into the nature of "common appendant or "nant." (Corbet's case, ubi sup.)

(*d*) 2 Bl. Com. 34.

(*e*) Bl. Com. ubi sup.

capable of maintaining during the winter. And a claim subject to no limitation of either kind, (except perhaps in the case where an express grant to that effect could be shown,) would be void (*f*). But with respect to a common in gross, it would seem that it may be either limited to a particular number, or be absolutely unlimited; which is called a common *without stint*, or *sans nombre* (*g*).

2, 3. Common of *piscary* is a liberty of fishing in another man's water—as common of *turbary* is a liberty of digging turf upon another man's ground (*h*). And with respect to common of turbary, in particular, it may be remarked that, like common of pasture, it may be either by grant or prescription; and may be either appurtenant or in gross; but it is usually claimed as appurtenant, and by prescription; and as to a common of turbary of this kind, we may notice that it cannot be claimed as appurtenant to land, but only to a house (*i*); and it authorizes not the taking of turf except for the purpose of using the same as fuel, in the particular house to which the right is annexed (*k*).

4. [Common of *estovers* or *estouviers* (from *estoffer*, to furnish), is a liberty of taking *necessary* wood for the use or furniture of a house or farm from off another's estate (*l*); and it may be claimed, like common of pasture, either by grant or prescription.

(*f*) 1 Saund. by Wms. 28 b. n. (4); Bennett *v.* Reeve, Willes, 231; Chester, 8 T. R. 396; *v.* Hardham, 1 Barn. & Ald. 711. As to the number of which may be turned on of vicinage, see Corbet's 7 Rep. 5.

Co. Litt. 122a; How *v.* Strode, 2 Wils. 274; 3 Bl. C. 237, 239. It been denied that even a com- in gross can be *sans nombre*, l. 346. But see Co. Litt. by Harg. ubi sup. n. (5). We may here, that the term *re* is sometimes applied to the of common for cattle *levant* and *couchant*, Saund. by Wms. ubi sup. But this is not the sense in which it is used by Lord Coke.

(*h*) Co. Litt. ubi sup.; Wilson *v.* Willes, 7 East, 121. See Peardon *v.* Underhill and others, 20 L. J. (Q. B.) 133.

(*i*) Tyringham's case, 4 Rep. 37 a.

Valentine *v.* Penny, Noy, 145. As to *estovers*, vide sup. p. 256.

[These several species of common, when originally established in our law, had all reference, no doubt, to the same object as common of pasture, viz. the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary for his fuel; and common of estovers for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

5. In addition to the above-mentioned rights of common, there is also common *in the soil*; which consists of the right of digging for coals, minerals, stones and the like (*m*); and this last species, and common of turbary, bear a resemblance to common of *pasture* in many respects, though in one point they go much further: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; while common of turbary, and of digging for coals, and the like, are a right of carrying away the very soil itself.

By the Statute of Merton (20 Hen. III. c. 4) the lord of a manor may inclose against common *of pasture* (*n*), though not in general against common of estovers or of turbary (*o*), so much of the waste as he pleases, for tillage or wood ground—provided he leaves common sufficient for such as are entitled thereto (*p*). This enclosure, when justifiable, is called in law "approving,"—an antient expression, signifying the same as "improving" (*q*). And this right is considered as applying equally to any owner

(*m*) Co. Litt. 41 b, 122 a; and see Cooke on the Law of Rights of Commons, pp. 8, 37 (2nd edit.).

(*n*) And see 13 Edw. 1, c. 46; 3 & 4 Edw. 6, c. 3; 29 Geo. 2, c. 36; 31 Geo. 2, c. 41; 39 & 40 Vict. c. 56, s. 31; 42 & 43 Vict. c. 37; see also 13 Geo. 3, c. 81, and 45 & 46 Vict. c. 15, for regulation, by the of the mode of enjoying their common rights.

(*o*) 2 Inst. 87; Bateson v. Green, 5 T. R. 416; 1 Saund. by Wms. & Pat. 353 b, n. (*b*); Arlett v. 7 Barn. & Cress. 369.

(*p*) Arlett v. Ellis, ubi sup. Patrick v. Stubbs, 9 Mee. & W. Lake v. Plaxton, 10 Exch. Smith v. Brownlow, Law 9 Eq. Ca. 241; Warrick v. Coll. Oxford, ib. 10 Eq. Ca. 105; and generally Scriven on 6th ed., by Brown, pp. 307—318.

(*q*) 2 Inst. 474.

[of the waste, though he may not fall within the description of lord of the manor (*r*).]

But the inclosure of common fields and waste lands, and the consequent extinction of common rights therein, are objects of so much importance to agricultural improvement, that they were not left in modern times to depend on this antient statute; but were introduced very generally, throughout entire manors and parishes in almost every part of the kingdom, by force of local acts of parliament, passed from time to time for the purpose. And in aid of this practice was passed the statute 41 Geo. III. c. 109, which consolidated a number of regulations, and made them applicable to every case of local inclosure, so far as the particular Act, under which the proceeding took place, contained no provision to the contrary (*s*).

It is not, however, merely by force of local Acts, or of the regulations contained in 41 Geo. III. c. 109, thus connected with them, that an improvement of this description is now effected; but they are carried on under the provisions of certain statutes known as "The Inclosure Acts," of which the chief is the 8 & 9 Vict. c. 118, passed in the year 1845 (*t*). By this Act, (which was in substitution for a previous one on the same subject, the 6 & 7 Will. IV. c. 115), after reciting that "it is "expedient to facilitate the inclosure and improvement "of commons and other lands, subject to rights of pro- "perty which obstruct cultivation and the productive em- "ployment of labour; and to facilitate such exchanges "of lands, and such divisions of lands intermixed or "divided into inconvenient parcels, as may be beneficial

(*r*) Glover *v.* Lane, 3 T. R. 445.

(*s*) As to the construction of this statute (often spoken of as The Inclosure Act), see Doe *v.* [illegible], 2 Exch. 692.

(*t*) This Act has been amended by 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43; 31 & 32 Vict. c. 89; 39 & 40 Vict. c. 56; 41 & 42 Vict. c. 56; 42 & 43 Vict. c. 37; and 45 & 46 Vict. c. 15.

"to the respective owners; and to provide remedies for "the defective or incomplete execution, and for the non-"execution, of powers created by general and local Acts "of inclosure, and to authorize the revival of such powers "in certain cases"—an extensive and elaborate system of regulations is laid down in reference to those several purposes (*u*). We can attempt no more, however, in this place, than to give a summary statement of its general principle; which is to establish a board of commissioners, under the denomination of "The Inclosure Commissioners for England and Wales" (*x*), who are empowered—on the application of persons interested to the amount of one-third of the value of the lands subject to be inclosed (*y*), and

(*u*) As to *exchanges* and
of lands under the provisions of the Inclosure Acts, see 8 & 9 Vict. c. 118, s. 147; 9 & 10 Vict. c. 70, s. 9; 11 & 12 Vict. c. 99, ss. 13, 14; 12 & 13 Vict. c. 83, s. 7; 17 & 18 Vict. c. 97, ss. 2, 3; and 20 & 21 Vict. c. 31, ss. 4 11. It is to be observed that both an exchange and a partition may now, under these Acts, take place on the
of parties interested, even in
where no proceedings for an
sure are pending, or where
lands are not subject to be inclosed. On the construction of the
of these Acts relative to
see Minet v. Leman, 24 L. J., Ch. 545.

(*x*) As to the board of which these commissioners now form part, vide sup. p. 646,

(*y*) As to the
"*interested*" within the meaning of 8 & 9 Vict. c. 118, see sect. 16 of that Act. As to the description of lands *subject to be inclosed* it is given in the 11th section as follows:—
lands subject to any right
of common whatever, and w
rights may be exercised at all
s, or only at limited times
or subject to any suspen-
in respect of the
of ut; all gated and
stinted in which the pro-
the or is not in
the of or other
or all land held, occu
or used in common either at all
or during any time or season,
or lically, and either for all
or for any limited purpose,
and whether the separate parcels of the several owners of the soil
or shall not be known by
or bounds, or be otherwise distinguishable; all land in which the property or right to the vesture or herbage, or any part thereof, during the whole or any part of the year, or to the wood or underwood growing thereon, is separated from the property of the soil; and all lot meadows and other lands, the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the

provided the consent of persons interested to the amount of two-thirds of the value of the land, and of the lord of the manor (in case the lands be waste of a manor), be ultimately obtained,—to inquire into the case, and to report for the information of parliament in reference to the expediency of making such inclosure. And if thereon an Act be passed to the effect that such inclosure be proceeded with, the allotment and inclosure of the lands take place accordingly, —the proceedings being conducted by the aid of a *valuer* appointed for the purpose, and under the superintendence of the inclosure commissioners (*z*).

The 8 & 9 Vict. c. 118, further declares, that immediately after such allotment and inclosure of the lands shall have been made, or from such other time as shall be fixed after proper notice, the common or other rights, which it is the object of the inclosure to commute, shall be *extinguished* accordingly; and it directs that copies of the award (which is under the seal of the inclosure commissioners) shall be deposited with the clerk of the peace for the county, and also with the churchwardens of the parish, so that recourse thereto may be freely had by any person interested in the premises (*a*).

It may be noticed, in concluding our remarks on this subject, that by one of the group of Inclosure Acts to which we have referred, namely, by the "Commons Preservation Act, 1876," it is provided that an encroachment on, or inclosure of, a town or village green or recreation ground, having a

owners in any known course of rotation or otherwise." Moreover by 11 & 12 Vict. c. 99, s. 1, a party interested in any land not otherwise subject to a proposed inclosure, may nevertheless submit it, upon terms, to the operation of such inclosure; which shall be extended to it accordingly, if the commissioners think that course beneficial. And by 17 & 18 Vict. c. 97, s. 3, the word "land" in the Inclosure Acts shall extend to incorporeal as well as corporeal hereditaments, and to any undivided share thereof.

(*z*) 8 & 9 Vict. c. 118, ss. 32, 33; 15 & 16 Vict. c. 79, s. 1. For the form of an Act, upon the general *annual* report of the
or upon a *special* report, see
26 Vict. cc. 47, 94.

(*a*) 8 & 9 Vict. c. 118, s. 146.

known and defined boundary, is declared to be a public nuisance, and punishable by way of summary conviction before the magistrates; and that a civil jurisdiction is, by the same statute, given to the county court of the district to hear any case of illegal inclosure, encroachment on, or nuisance affecting any common within the district made after the passing of that Act, and to grant injunctions or make orders of removal or abatement as may be required. An appeal is, however, given to the High Court of Justice (*b*).

II. A second species of incorporeal hereditaments is that of *ways*, or the right of going over another man's ground. We speak not here of *highways*, which are common to the public, and which consequently belong to the division of public and not of private rights (*c*); but of *private* ways, in which one man may have an interest and a right, though another be owner of the soil. Such ways may be grounded on actual grant; as when the owner of land grants, by deed, to another man the liberty of passing over it to go to church, to market, or the like (*d*): or they may be by prescription; as if all the owners and occupiers of such a farm have long used to cross such a ground for such a particular purpose (*e*): or by custom; as if a similar practice has obtained with respect to all the inhabitants of a certain hamlet (*f*); for this antient usage supposes an original grant, whereby a right of way was originally created. And upon whichever of these titles the right may stand, it is capable, like that of common, of being either *appurtenant* to some particular house or land, or *in gross*, and annexed to the person of the grantee; but the existence of ease-

(*b*) 39 & 40 Vict. c. 56, ss. 29, 30. also 41 & 42 Vict. c. 71, s. 3; 42 & 43 Vict. c. 37.

(*c*) As to highways, vide bk. IV. pt. III. ch. VII.

(*d*) Unless the grant be by deed, it would be a mere revocable mission. (See Wood *v.* 13 Mee. & W. 838.)

(*e*) As to title by prescription, vide post, p. 688.

(*f*) 2 Bl. Com.

ments *in gross* has latterly been denied (*g*); and the correct view regarding easements so-called *in gross* appears now to be to either regard them as mere licences, or else to find for them some possible legal origin, as having been originally appendant or appurtenant to some corporeal hereditament (*h*). A right of way may also arise by necessity. Thus if A. grants to B. a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives him a way to come to it (*i*); for that is necessary to its enjoyment (*k*); and he may cross his land for that purpose without trespass (*l*). In like manner a tenant at will shall, after the determination of his interest by the lessor, have free entry, egress and regress into the land, in order to cut and carry away the emblements; for when the law gives a right, it gives everything necessary to its exercise (*m*).

III. *Watercourses* are also a species of incorporeal hereditament. A watercourse may be defined, generally, as the right which a man has to the benefit of the flow of water; and such right most commonly refers to a river or stream, the banks of which belong either to the claimant on both sides, or to him on one side, and to his neighbour on

(*g*) Rangeley *v.* Midland Rail. Co., L. R., 3 Ch. App. 306.

(*h*) See Scriven on Copyholds, by Brown, 6th ed. pp. 379—380.

(*i*) See Clarke *v.* Cogge, Cro. Jac. 170; Dutton *v.* Tayler, 2 Lutw. 1487; Howton *v.* Frearson, 8 T. R. 50; Morris *v.* Edgington, 3 Taunt. 24; Bullard *v.* Harrison, 4 Man. & Sel. 392; Hinchliffe *v.* Lord Kinnoul, 5 Bing. N. C. 24, 25; Allan *v.* Gomme, 11 A. & E. 759; Henning *v.* Burnet, 8 Exch. 187; Skull *v.* , 16 C. B., N. S. 81.

v.

Wms. Saund. 321, n. 6; Gayford *v.* Moffatt, Law Rep., 4 Ch. App. 133.

(*l*) Blackstone (vol. ii. p. 36) says that by the Law of the Twelve Tables at Rome, where a man had a right of way over another's land and the proper road was *out of repair*, he might go over any part of the land he pleased; and that such was the established rule in public as well as private ways. He adds, that the law of England, in both cases, seems to correspond with the Roman. As to this proposition, see Taylor *v.* Whitehead, Doug. 745.

(*m*) Co. Litt. 55 *a*, 56 *a*. As to , vide sup. pp. 258, 288.

the other (*n*): in which latter case, it may be remarked that,—unless indeed the river be navigable, for then the bed of it, so far at least as the tide of the sea flows, presumably belongs to the crown (*o*),—the proprietor of each bank is considered as *primâ facie* the proprietor also of half the land covered by the water; that is, *usque ad medium filum aquæ* (*p*). But a watercourse is distinguishable from the right of merely using the water flowing over the soil, which is incident as of course to the property in the soil itself. For it consists in having the course of the water kept free from any interruption or disturbance to the prejudice of the claimant of the right, by the acts of persons from without and in parts not within his own territory,—whether owing to a diversion of the water, or its obstruction, or its pollution by any offensive commixture. This right belongs *primâ facie* to every occupier of land over which a stream passes (*q*); for though running water, air and light are all *publici juris*, yet to a certain extent they are subject (as before shown) to appropriation by force of an actual occupancy (*r*); and he who is in possession of any soil, is *primâ facie* in possession also of the free course of the streams which flow over its surface (*s*). But the right may be divested by express agreement between the parties interested; or by long usage, which is evidence of some antient agreement of that description. And therefore my general claim to have the water of such a stream flowing freely and without disturbance over my land, may

(*n*) See Wright *v.* Williams, 1 Tyr. & Gran. 398; Wood *v.* Waud, 3 Exch. 748.

(*o*) Williams *v.* Wilcox, 8 Ad. & El. 333.

(*p*) Hale, De Jure Maris, part i. c. 1; Wright *v.* Howard, 1 Sim. & Stu. 190; 2 Rol. Ab. 170.

(*q*) Shury *v.* Piggott, 3 Bulst. 340. See Embrey *v.* Owen, 6 Exch. 369.

(*r*) Canham *v.* Fisk, 2 Tyr. 166; vide sup. pp. 155,

(*s*) It is to be observed, that the doctrines laid down in the text as to watercourses apply only to *surface* streams or rivers. As to wells, or springs beneath the ground, see Wood *v.* Waud, 3 Exch. 748; Race *v.* Ward, 4 Ell. & Bl. 702; Chasemore *v.* Richards, 2 H. & N. 168; Acton *v.* Blundell, 12 Mee. & W.

be successfully opposed by my neighbour, if he can prove that, by some grant of mine or of my ancestors, he is authorized to keep up a mill or the like, and thereby to cause an obstruction of the stream—or if he can establish a title by long usage to do so. He has then by grant or by prescription a watercourse for such special purpose (*t*); to which the general right I might otherwise have had by occupancy has become subordinate (*u*).

IV. *Lights*, also, are a species of incorporeal hereditaments (*x*); the term being used to express a man's right to have the access of the sun's rays to his windows, free from any obstruction by the occupier of adjoining land. The element of light, like that of water, is capable to a certain extent of appropriation by mere occupancy—for a man on his own land has a right to all the light which will come to him; and may erect a house (even at the boundary line of his property, and so as to overlook his neighbour) with as many windows as he pleases (*y*). And by force of

(*t*) As to the title by prescription, vide post, p. 688.

(*u*) See Mason *v.* Hill, 3 Barn. & Adol. pp. 1, 304, and the cases there cited, where (it is conceived) sufficient authority for the positions in the text on this somewhat obscure subject will be found. See also Sampson *v.* Hoddinott, 1 C. B. (N. S.) 590.

(*x*) As to "lights," see Aldred's case, 9 Rep. 58 b; Cross *v.* Lewis, 2 Barn. & Cress. 686; Moore *v.* Rawson, 3 Barn. & Cress. 332; Garrit *v.* Sharp, 3 Ad. & El. 325; Hutchinson *v.* Copestake, 8 C. B. (N. S.) 102; 9 C. B. (N. S.) 863; Jones *v.* Tapling, 11 C. B. (N. S.) 283; 12 C. B. (N. S.) 826; Clarke *v.* Clark, Law Rep., 1 Ch. Ap. 16; Yates *v.* Jack, ib. 295; Dent *v.* Auction Mart, ib. 2 Eq. C. 238; Lanfranchi *v.* ib. 4 Eq. Ca. 421; Heath *v.* Bucknall, ib. 8 Eq. Ca. 1; Aynsley *v.* Glover, ib. 18 Eq. Ca. 544; Hackett *v.* Baiss, ib. 20 Eq. Ca. 494; Smith *v.* Smith, ib. 500; Courtauld *v.* Legh, ib. 4 Exch. 126; Moore *v.* Hall, ib. 3 Q. B. D. 178. See also as to the former custom *of London* with respect to lights, Shadwell *v.* Hutchinson, 2 Barn. & Adol. 97; Wynstanly *v.* Lee, 2 Swanst. 333; Salters' Company *v.* Jay, 3 Q. B. 109; Cooper *v.* Hubbock, 12 C. B. S.) 456; Yates *v.* Jack, ubi

(*y*) Per Bayley and Holroyd, Js., Cross *v.* Lewis, 2 Barn. & Cress. 689, 691; per Littledale, J., Moore *v.* Rawson, 3 Barn. & Cress. 340; and see Chandler *v.* Thompson, 3 Camp. 82.

a grant, or prescription, he may become entitled to maintain these windows in freedom from all obstruction (*z*). But on the other hand, in the absence of any grant, and before the period has elapsed which suffices for the establishment of a prescriptive claim, it is competent to the owner of the adjoining land in his turn to construct a wall or house on it, so near to the building erected by his neighbour, as to intercept the light, which it would otherwise have received; for his right to erect edifices on any part of his own soil, is as clear as that of the first builder (*a*).

V. [*Franchises* are a fifth species of incorporeal hereditaments. Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or branch of the crown's prerogative, subsisting in the hands of the subject (*b*). Being therefore derived from the crown, they must arise from royal grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant (*c*). The kinds of them are various and almost infinite; we will here mention some of the principal, premising only that they may be vested in either natural persons or bodies politic; in one man or in many; but the same identical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice a former grant (*d*).

To be a county palatine is a franchise vested in a

(*z*) Blanchard *v.* Bridges, 4 Ad. & El. 195; Swansborough *v.* Coventry, 9 Bing. 305. As to the title by prescription in the case of lights, and the length of time which suffices for its establishment, vide post, p. 696.

(*a*) Blanchard *v.* Bridges, 4 Ad. & Ell. 195. Per Littledale, J., Moore *v.* Rawson, 3 Barn. & Cress. 340.

(*b*) Finch, L. 164. The definition by Finch can only be said to to such franchises as are connected with the *realty*. The word also in a different sense, as in the expression "parliamentary franchise," where it imports only the right to vote at the election of a member of parliament.

(*c*) Co. Litt. 114 a.

2 Roll. Ab. 191; Keilw.

[number of persons (*e*). It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession, and to do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom.] So there may be a franchise to have a bailiwick or liberty exempt from the sheriff of the county, wherein the grantee only and his officers are to execute all process (*f*): and other franchises there are which are frequently annexed to *manors* (*g*); as for a man to hold a court leet, in certain cases, among the tenants and residents of his manor (*h*). So there may be a franchise to have waifs, wrecks, estrays, treasure-trove, royal fish, and forfeitures (*i*); the nature of which will more particularly appear when we come to speak of the crown's prerogative (*k*): to have a fair, market, ferry, or the like,—with the right of taking toll there (*l*): or to have forest, chase, park, warren or fishery. Among these there are many which belong, in point of arrangement, to other parts of the present treatise; but to others more particular notice is due in this place.

1. And, first, as to fairs, markets, and ferries. A man may have a right to hold a fair or market, or to keep a boat for the ferrying of passengers; and this either by act of parliament, by royal grant, or by prescription (*m*).

(*e*) As to counties palatine, vide sup. p. 129.

(*f*) See 13 & 14 Vict. c. 105, for facilitating the union of liberties with the counties in which they are situate; and 21 & 22 Vict. c. 22, abolishing certain franchise prisons.

(*g*) As to manors, vide sup. p. 214.

(*h*) As to a court leet, vide post, bk. VI. c. XIV.

(*i*) Blackstone (vol. ii. p. 37) adds "deodands" to these instances of franchises; but by 9 & 10 Vict. c. 62, deodands are abolished. As to their nature, vide post, bk. IV. pt. I. c. VII.

(*k*) Vide post, bk. IV. pt. I. c. VI.

(*l*) As to the tolls or fairs or markets belonging to the *crown*, see 15 & 16 Vict. c. 62, s. 6.

(*m*) 2 Inst. 220; Trotter *v.* Harris, 2 Y. & J. 285. Fairs and markets are often regulated by act of parliament; and see 10 & 11 Vict. c. 14 (called "The Markets and Fairs Clauses Act, 1847"), consolidating into one statute certain provisions usually inserted in such acts

But no other title than these will suffice; for no fair, market or ferry can be lawfully set up without licence from the crown (*n*). On the other hand, a man may, under such titles, lawfully claim to be lord of a fair or market, though he be not the owner of the soil on which it is held (*o*); or to be the proprietor of a ferry (*p*), though he be not the owner either of the water over which it is exercised (*q*), or of the soil on either side of the river (*r*); but, in such cases, he must possess over the soil such rights, at least, as will authorize him to embark and disembark his passengers thereon (*s*). The right to take toll, also, from the customers, is usually—though in the case of a fair or market not necessarily—a part of the privilege (*t*); and the tolls of a fair or market are due either in respect of goods sold there (that is, from the seller, not the buyer), or for stallage or pickage, or the like, in respect of stalls or poles fixed in the soil (*u*). But the right of the crown to authorize the collection of tolls is viewed by the law with a salutary jealousy; so that no burthen of that kind can be imposed on the public, unless it have (in the lan-

of regulation. As to days of holding fairs and markets, see 27 Hen. 6, c. 5, and 36 & 37 Vict. c. 37. As to Greenwich market, see 12 & 13 Vict. c. 28. As to a metropolitan market in lieu of Smithfield, 14 & 15 Vict. c. 61. As to preventing unlawful fairs in the metropolitan police district, see 31 & 32 Vict. c. 106. It may be here remarked that by a recent act of parliament (34 & 35 Vict. c. 12), the Secretary of State may on the representation of the magistrates of the district, and with the previous consent in writing of the owner of the fair for the time being, order that any particular fair shall be abolished.

(*n*) 2 Inst. 220; R. v. Marsden, 3 Burr. 1812; Willes, 512, (n.); Com. Dig. Piscary, B.; *Jure Maris*, part i. c. 2.

(*o*) Bac. Ab. Fairs, &c. D. n. (*a*); Mayor of Northampton v. Ward, 2 Stra. 1238; 1 Wils. 107; but see per Littledale, J., R. v. Starkey, 7 Ad. & E. 106.

(*p*) See Newton v. Cubitt, 12 C. B., N. S. 32. As to antient ferries, see also Letton v. Goodden, Law Rep., 2 Eq. Ca. 123.

(*q*) Com. Dig. in tit. Piscary, B.

(*r*) Peter v. Kendal, 6 B. & C. 703.

(*s*) Ibid.

(*t*) Heddy v. Wheelhouse, Cro. Eliz. 558, 592; Lord Saul, 6 Ad. & El. 924; R. v. 7 Ad. & El. 106.

(*u*) 2 Inst. 219.

guage of the books) a reasonable commencement (*x*); that is, unless it be founded on an adequate consideration, as between the public and the grantee: which consideration, in the case of a fair or market, is the duty incumbent on the grantee to provide ground for the purpose, and to regulate the proceedings; in that of a ferry, to keep up a boat for a passage over a stream not otherwise fordable (*y*). And it is also essential that the burthen be reasonable in its amount (*z*); for where the tolls granted are outrageous, the franchise is illegal and void (*a*). It is however to be remarked, that, when any one of the privileges in question can be shown to exist, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll where it is due, but also against those who disturb his franchise by setting up a new fair, market or ferry, so near to his as to diminish his custom (*b*); while on the other hand he is himself liable to be criminally indicted, if by his wilful act, or even by his neglect of duty, the subjects of the realm are obstructed in its lawful use (*c*).

2. As to the franchises of forest, chase, park, warren, and fishery,—

A *forest* (in the legal sense) is the right of keeping, for the purpose of venary and hunting, the wild beasts and fowls of forest, chase, park, and warren, (which means in effect all animals pursued in field sports,) in a certain territory or precinct of woody ground or pasture set apart for the purpose; with laws and officers of its own, established for protection of the game (*d*). It is a principle of

(*x*) 2 Bl. Com. 37; Mayor of Nottingham *v.* Lambert, Willes, 116.

(*y*) Heddy *v.* Wheelhouse, Cro. Eliz. 558, 592.

(*z*) Ib.; 2 Inst. 219.

(*a*) Stat. Westm. 1 (3 Edw. 1), c. 31; 2 Inst. 219; Cro. Eliz. ubi sup.; 2 Bl. Com. 37; Willes, 116.

(*b*) 2 Roll. Ab. 140; Com. Dig. Action on the Case for a Nuisance, (A); Blisset *v.* Hart, Willes, 503; De Rutzen *v.* Lloyd, 5 Ad. & E. 456; Bridgland *v.* Shapter, 5 Mee. & W. 375; Pim *v.* Curell, 6 Mee. & W. 234.

(*c*) Willes, 512, (n.); Payne *v.* Partridge, 1 Show. 231.

(*d*) Co. Litt. 233 a; Manwood, Forest Laws, 41, 52, edit.

our law, that will be noticed more fully in its proper place, that in general no man can make title to animals *feræ naturæ*—for these, while they remain wild, are *nullius in bonis*, or (what amounts to the same thing) the common property of mankind. From this it results, that, though a man may take or kill on his own lands any particular animals *feræ naturæ*, that may happen to be found there (subject to the restrictions imposed by the Game Acts), and so that he invade not any exclusive franchise of sporting, which another person may possess over the same territory (*e*),—yet he is not at liberty to confine beasts of venary in a wild state within a particular precinct, for the mere purpose of diversion (even though on his own soil); for this is in some sense to appropriate what belongs equally to others, and is in the nature of an unlawful monopoly (*f*). Such at least was the principle of the antient law, which appears in this particular to remain unaltered; though by a distinction introduced in comparatively modern times, some kinds of animals *feræ naturæ*, such as deer, rabbits, and the like, may be

(*e*) Case of Monopolies, 11 Rep. 87 b. Blackstone (vol. ii. p. 415) supposed that the Norman race of kings introduced the doctrine, that the right of pursuing and taking beasts of venary belongs in every case to the sovereign only, or those by him authorized; and he considered this as a still existing doctrine of our law, and held that common the contrary sup- might be) no private person was entitled at common law to kill game, unless he could show a right of freewarren. But Blackstone's views on this subject have been with reason controverted, and the true rule seems always to have that which is stated by him- , as allowed viz., that in general every man has a right to hunt, &c. on his own grounds (see Wilk. Leg. Angl. Sax. LL. Can. c. 77,—a right, that is subject to such in the text. See Chit. , 3, 11 Rep. 87 b; Ld. Raym. 251; Salk. 556; Lord Dacre r. Tebb, 2 Bl. Rep. 1151; et post, bk. II. pt. II. c. II.

(*f*) None can make a park, chase, or warren, without the king's li- . for that is, *quodammodo*, to ose creatures which are *feræ naturæ*, and *nullius in* to restrain them of their

11 Rep. 87 b; and see ibid. 86 a; 2 Roll. Ab. 33, 812; 2 Inst. 199; Com. Dig. Chase, (D).

lawfully kept by any person in an enclosed place, if preserved as *property*, and not merely for the purpose of the chase (*g*). But the right to keep up animals in a wild state for mere diversion, though forbidden to the subject, has been at all times claimed, as a matter of prerogative, by the sovereign. [For we find, that even among the Saxons there were woody and desert tracts called the forests (*h*), which, having never been disposed of in the first distribution of lands, were held therefore to belong to the crown; and that these were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests, as is fully explained in the laws of Canute (*i*), which indeed was the antient law of the Scandinavian continent (*k*), from whence Canute probably derived it (*l*).] Afterwards, upon the Conquest, the Norman race of sovereigns exceeded even their predecessors in the eager enjoyment of this branch of the prerogative; for not only did they extend the limits of the antient forests, by encroachment on the lands of their subjects, and lay out new ones at their pleasure, without regard to the rights of private property (*m*), but they established a particular system of *forest law* (*n*), under colour of which the most horrid tyrannies and oppressions were exercised (*o*): so that our

See Davies *v.* Powell, Willes, 48; Morgan *v.* Abergavenny, 8 C. B. 768.

(*h*) It will be remarked that the term "forest" is applied in law, both to the franchise itself and to the territory in respect of which it is granted.

(*i*) Wilk. Leg. Angl. Sax. LL. Can. c. 77.

(*k*) "*feram quoque modo venari*" — Stiernhook, de Jure Sueon. l. 2, c. 8.

(*l*) 2 Bl. Com. 415.

(*m*) Manw. 319; 4 Inst. 300, 301.

(*n*) 1 Hist. Eng. Law, by Reeves, 206.

(*o*) "The penalty for killing a "stag or boar was loss of eyes—for "William loved the great game," says the Saxon Chronicles, "as if

ancestors at length became as zealous for its
as for the relaxation of the feudal rigours and other exactions introduced by the Norman family; and struggled for the *Charta de Foresta*, as strenuously as for the Great Charter itself (*p*). By this forest charter, confirmed in parliament in the ninth year of Henry the third (*q*), many forests unlawfully made (or at least many precincts added by unlawful encroachment to the antient ones) were *disafforested*, so as to remit to the former owners their rights (*r*),—though in the case of such precincts, called thenceforward *purlieus*, the crown still continued to exercise some of its privileges (*s*),—while in the forests that remained entire many abuses were reformed or mitigated. And owing to the variety of statutes afterwards made for amelioration of the forest laws, and above all to the entire disuse of them for centuries past by our sovereigns (*t*), this branch of the prerogative has long ceased to be a grievance to the subject (*u*). Some of the royal forests however still exist (*x*); and with some few exceptions, such

"he had been their father."—Hallam's Mid. Ages, vol. ii. p. 426, 7th edit.

(*p*) 2 Bl. Com. 416.

(*q*) Its clauses had been previously incorporated in the Great Charter of John, granted at Runnymede. Hallam's Mid. Ages, vol. iii. p. 222, n., 7th edit.

(*r*) Hist. of Eng. Law, by R
vol. i. p. 254. This charter is
sidered by Lord Coke as only a declaratory law; and he holds that the king could never make forests in the land of his subjects, without their consent. (4 Inst. 300.)

(*s*) 4 Inst. 303, 304; Com. Dig. Chase, 1. Purlieu is variously derived from *pur lieu* (exempt place), 4 Inst. ubi sup.; or *pourallée*, perambulation, Com. Dig. Chase, (I. 1).

(*t*) An attempt to revive
was made by Charles the first, and
were held by the chief jus-
in eyre, for recovery of the
's forestal rights (Hallam's
. Hist. vol. ii. p. 13); but by 16 Car. 1, c. 16, the extent of the royal forests was fixed according to their boundaries in the twentieth year of James the first; and no forest, where forest courts had not been held within sixty years before the first year of the reign of Charles the first.

(*u*) 2 Bl. Com. 416.

(*x*) See 34 & 35 Vict. c. 93, 35 & 36 Vict. c. 95, 36 & 37 Vict. c. 5, and 38 & 39 Vict. c. 6, authorizing a commission to inquire into rights or claims over the New Forest and Waltham (Epping) Forest; 14 & 15 Vict. c. 43, 21 & 22 Vict. c. 37, 29

as the New Forest in Hampshire, founded by the Conqueror, that of Windsor by Henry the eighth, and that of Richmond by Charles the first (*y*), are of such remote antiquity, that no trace is said to remain in history of their first creation (*z*).

Though a forest is in general a royal possession, we are nevertheless to observe that it is capable of being vested in a subject (*a*); for if the sovereign grant a forest to a private person, with words expressly authorizing the administration of forest law there, the grantee will have that franchise to its full extent, with all the appropriate courts and officers (*b*). It is also to be remarked, that a forest is a right which the owner thereof (whether sovereign or subject) may have either in his own lands or in the lands of another (*c*): and in this respect it differs from a right of common, and the other incorporeal hereditaments above described; for these rights of common, as they issue out of the soil, cannot exist in the same man who is general owner of the soil itself, (the latter title superseding all inferior claims like these,) and are consequently rights which a man can claim to exercise only *in alieno solo* (*d*); but a forest, and indeed all franchises in general, are inheritances collateral to the

& 30 Vict. c. 62, as to the forest of Hainault; 14 & 15 Vict. c. 76, 16 & 17 Vict. c. 19, and 17 & 18 Vict. c. 49, as to the New Forest; 16 & 17 Vict. c. 36, and 19 & 20 Vict. c. 32, as to the forest of Whichwood; 16 & 17 Vict. c. 42, 28 & 29 Vict. c. 16, as to the forest of Whittlewood; 18 & 19 Vict. c. 46, as to the forest of Woolmer; 19 & 20 Vict. c. 13, as to the forest of Delamere; 24 & 25 Vict. c. 40, 29 & 30 Vict. c. 70, and 31 & 35 Vict. c. 85, as to the forest of Dean and the mines and quarries therein.

(*y*) As to Richmond Park, see Hallam's Const. Hist. vol. ii. p. 14, n., 3rd edit.

(*z*) See 4 Inst. 319, where it is said that the forests in England are in number sixty-nine; see also as to the antiquity of the forests, 4 Inst. 293, 294.

(*a*) Co. Litt. 233 a.

(*b*) Case of Leicester Forest, Cro. Jac. 155; see Coleridge's Blackstone, vol. ii. p. 38, n. (19).

(*c*) 4 Inst. 301, 318; Lord Dacre *v.* Tebb, 2 Bl. Rep. 1151; Sutton *v.* Moody, Ld. Raym. 251.

(*d*) See Lloyd *v.* Earl Powis, 4 El. & Bl. 485.

ownership of the land (*e*), and may be claimed by a man either *in proprio solo* or *in alieno solo* (*f*). The owner of a forest is also considered (notwithstanding the general rule that title cannot be made to things *feræ naturæ*) as having a qualified property in the wild animals of chase and venary there found, so long as they continue therein; and no other person can lawfully take them within those precincts, or chase them from thence and take them in other ground (*g*). But if a wild animal strays from the forest, it ceases to be the property of the owner of the franchise, and will belong to the first taker (*h*).

A *chase* is a franchise granted by the crown to a subject, empowering the latter to keep for his diversion, within a certain precinct so called, the wild animals of chase, which in a legal sense are the same with those to which the right of forest extends (*i*); but the franchise does not authorize the establishment of forest law within such precinct (*k*).

A *park* properly signifies an inclosure, and is popularly applied to any ground which a gentleman chooses to surround with a wall or paling, and to stock with a herd of deer; but in the technical sense in which we now use the term, a park is nearly equivalent to a chase, being in effect no other than a chase *inclosed* (*l*).

A *free-warren* is a similar franchise (*m*), granted by the

(*e*) 4 Inst. 318.

(*f*) 2 Bl. Com. 38.

(*g*) Sutton v. Moody, Ld. Raym. 251; 2 Bl. 394, 395, 419.

(*h*) 12 Hen. 8, f. 10, cited 2 Christian's Black. 419, n.; and Keilw. 30; Sutton v. Moody, sup.

(*i*) Co. Litt. 233 a.

(*k*) Manw. 52. See also 2 Bl. Com. 415, where a chase or a park is described as "a smaller forest in hands of a subject, but by

(*l*) Manw. 52; 2 Bl.

(*m*) See Bro. Ab. tit. Warren; Dyer, 30 b; Co. Litt. 2 a, 114 b; Keilw. 148, n., Boulston v. Cro. Eliz. 548; Wadhurst v.. Forest, ib. 155; 1 Saund. 84, n. (3,; Attorney-General v. 2 Tyrw. 223; Vere v. 11 East, 568; Mercs Taunt. 442, Lord Dacre v. Tebb, Bl. Rep. 1151; Patrick v. way, 1 Saund. 346; Pannell 3 C. B. 625.

crown to a subject, for preservation or custody of beasts and fowls *of warren;* which, according to Lord Coke, are "hare, coney, roe," "partridge, quail, rail, &c.," "phea-"sant, woodcock, &c.," "mallard, heron, &c." (*n*). To this, as well as to chase and park, apply generally the principles which have been before noticed in respect of a forest; with this exception, however, as to a park, that it is incapable or being claimed *in alieno solo*, and can exist only in land belonging to the owner of the franchise himself (*o*).

A *free fishery* (*p*), or exclusive right of fishing in a public river, is also a royal franchise (*q*). In private rivers (viz. in those not navigable), as the bed or soil, so the right of fishing, presumably belongs to the owners of the land on either side, and to them only (*r*). But in those which are public,—that is, navigable,—while the bed (so far at least as the tide flows) appertains to the crown—the right of fishing belongs *primâ facie* to the public at largo (*s*). But in either public or private rivers, there may

(*n*) Co. Litt. 233 a; where these &c.'s are left without explanation. Manwood, on the other hand, says, "There are only two beasts of "warren, the hare and the coney, "and but two fowls of warren, the "pheasant and the partridge."—Manw. 95; and see Barrington's case, 8 Rep. 138 b. It has been held that "grouse" are not birds of warren. (Duke of Devonshire *v.* Lodge, 7 B. & C. 36.)

(*o*) 2 Bl. Com. 38. Blackstone remarks on the other hand (p. 39), that free

solo; and accounts for it by the fact, that antiently keen sports-on selling their lands, often to themselves and their heirs, the free-warren that they had in them.

(*p*) As to the law of free fishery, Hale, de Jure Maris, part i. c. 4; Lord Fitzwalter's case, 1 Mod. 105; Warren *v.* Matthews, 1 Salk. 357; Smith *v.* Kemp. 2 Salk. 637; Carter *v.* Mercot, 4 Burr. 2162; Case of River Banne, Davies, 55; Mannall *v.* Fisher, 5 C. B. (N. S.) 856; The Free Fishers of Whitstable *v.* Gann, 13 ib. 853.

(*q*) Blackstone adds, (vol. ii. p. 39,) that it "is considered as such "in all countries where the feudal "polity has prevailed," and he cites . Mar. Claus. i. 24; Dufresne, v. 503; Craig, de Jure Feod. II. 8, 15.

(*r*) Hale, de Jure Maris, pt. i. c. 4; vide sup. p. 454.

sup. cc. 1, 2, 4.

be a particular title in some individual, by which such presumptive right may be controlled; and this may take place, in a public river, by force of some royal grant or prescription entitling a private person and his heirs to the exclusive right of fishing therein (*t*): a privilege called in the books a "free fishery" (*u*). Grants of this description can no longer be made by the crown (*x*); being prohibited by King John's great charter (*y*), and the second and third confirmations of it in the reign of his successor; but the right of conferring them was considered, (prior to these charters,) as one of the flowers of the prerogative (*z*); and it is from this origin that the validity of a free fishery at the present day must in every case be derived. The privilege materially differs, it will be observed, from the right of *common of piscary* formerly mentioned, that being not exclusive in its nature, nor a franchise, but

(*t*) As to public rivers, see Ward r Cresswell, Willes, 265, Mayor, &c. of Orford r Richardson, 4 T R. 437; 2 H. Bla 182, S. C., Bagott r. Orr, 2 Bos. & Pul. 472. Blundell r. Catterall, 5 B. & Ald 2 Williams r. Wilcox, 8 Ad. & E. 333.

(*u*) 2 Bl. Com. pp. 39, 40. There are in law, the three different terms of *free fishery*, *several fishery*, and *common of fishery* or *piscary* Smith r. Kemp, Salk. 637; and it is re- by Blackstone (ubi sup., y are very in our in Co. Litt. own use of the term free fishery is quite correct, and whether it does not apply to all s, whether public or As to a "several fishery," see Holford r. Bailey, 8 Q. B. 1000; . Ulleswater Steam Na- Company, 3 B. & Smith, 4 Exch 361, Bristow r. Cormican, ib 4 App Ca 641 Much information as to the antient law o will be found in some of Acts r. W ., 3 Q. B. 2 and C. P. 6 Bl. ubi sup.; see Duke r. B. to of a f when The Mayor of C . Brooke, 7 Q. B 385.

(*y*) Cap. 47, edit.

(*z*) The right was also exercised e crown, and granted out to , of making weirs on our rivers; but this also was restrained by Magna Charta and su r. Wilcox, 8 Ad. & E.

referable to private rivers, and capable of being created by the grant of a subject (*a*). In further illustration of the difference between them, we may add that, in a free fishery a man has a qualified property in the fish before they are caught; in a common of piscary, he has no property till afterwards

VI. *Rents* are the last species of incorporeal hereditaments that we propose to notice. The word rent, *reditus*, signifies a compensation or return yielded periodically, to a certain amount, out of the profits of some corporeal hereditament, by the tenant thereof. To obtain a clear idea of the legal incidents of rent, it may be useful to dwell a little upon some of the points of this definition. First, then, it is yielded, that is, paid as a thing due. And therefore it is said, by the antient lawyers, to *lie in render*, in contradistinction to those incorporeal hereditaments, (as common or the like,) which the party entitled to, is to take for himself, and which are, consequently, said to *lie in prendre* (*c*). It must also be of certain amount, or that which may be reduced to certainty, by either party; for *certum est, quod certum reddi potest* (*d*). It must besides be payable periodically; as yearly, or in every second, third or fourth year, or the like (*e*). Again, it is considered as payable out of the profits of the land, and must consequently not be part of the land itself (*f*); wherein it differs from an exception in a grant, which is always part of the thing granted (*g*). Hence there cannot be reserved, by way of rent, the vesture or herbage of the land demised (*h*); though there is no occasion for rent to be, (as it usually is,) a sum of money; for spurs, capons, horses, corn and other matters may be rendered by way of rent (*i*). Moreover,

(*a*) Vide sup. p. 656.
(*b*) 2 Bl. Com. 40; F. N. B. 88. Smith v. Kemp, 2 Salk. 637.
(*c*) Burton, Compend. 375. Co. Litt. 142 a. 47 a.
(*f*) Ib. 141 b, 142.
(*g*) Plowd. 13: 8 Rep. 71; Co. Litt. 142 a.
(*h*) Co. Litt. ubi sup.
(*i*) Ib.; see Doe v. Benham, 7 Q. B. 9.

as the general rule, it must issue out of hereditaments *corporeal*. Therefore a rent cannot be reserved out of a common, a franchise, or the like (*j*). And, lastly, the person from whom it is due must be the tenant of the land. But his tenancy may be either in possession, remainder or reversion; for a rent may be as well reserved upon the grant of a reversion or remainder, as on the conveyance of an estate in possession (*k*).

There were known to the common law three manner of rents, viz. rent-service, rent-charge, and rent-seek (*l*). *Rent-service* is where the rent accrues in connection with a tenure, attended (as tenure almost invariably is) by fealty or by fealty and other services (*m*); and this, whether the party to whom the rent is due be entitled to fealty, as having the reversion of the land out of which it issues, or as having the mere seigniory (*n*). Thus if A., seised in fee, make a gift of land to B. in tail,—or demise to him for life, or years,—reserving a rent; or if B. be seised in fee of a tenement holden of A. as lord of a certain manor, at a certain antient rent; such rent is, in either case, rent-service: for it is due as from a tenant owing fealty to his lord (*o*). To rent of this description, the common law attached as of common right,—and independently of any express provision for that purpose between the parties (*p*),

(*j*) Co Litt. ubi sup., 144 a, 47 a, Gilb. Rents, 20. The sovereign, r, by prerogative, and in a subject, by statute, have a rent issuing out of an hereditament. (Gilb. s, 22.) And in every case, the reservation of rent upon an incorporeal inheritance will be binding on the lessee, as a *contract* to pay so much money. (Cruise, Dig. Rents. And see also Musket r. Hill, 5 Bing. N. C. 694; Martyn r. Williams, 1 H. & N. 817; and r. 496.

(*k*) Co. Litt. 47 a, 142 a, Bac. Ab. Rent, B.; vide sup. p. 315.

(*l*) Litt. s. 213.

(*m*) Ib; Co. Litt. 122 a.

(*n*) Vide sup. p. 315.

(*o*) If a man holds, subject to a rent, as tenant at will, such rent is not rent-service, for there is no fealty; (vide sup. p. 294). lessor, however, may distrain as of common right. (Co. Litt. 57 b.)

(*p*) Litt. s. 214.

—the power of *distress* (*q*); that is, the lord was entitled, in the event of the rent's falling into arrear, to enforce payment without legal process, by entering upon the land, and seizing the goods and chattels found thereon. The other two species of rent differ from rent-service, in having no connection with fealty. But more particularly—a *rent-charge* is where the owner of the rent has neither seigniory nor reversion, and can consequently claim no fealty; yet is entitled to distrain, nevertheless, by force of an express contract; as where a man by deed conveys to another his *whole* estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress; viz.—that, if the rent be in arrear, it shall be lawful to distrain for the same (*r*); or where a man by deed grants out of the land whereof he is seised, a certain rent payable to another, with a like clause of distress (*s*). In either of these cases the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is *charged* with a distress for the payment of it (*t*). As for a *rent-seck* (*reditus siccus*) it is

Lord Chief Baron Gilbert (On Rents, pp. 3, 5) remarks, that "antiently the not paying attendance on the lord's courts, or not doing the feudal service, was punished with the forfeiture of the estate; but these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law." And this, he adds, "may easily account why the power of distraining always attended the fealty; because the power of seizure (for forfeiture) could only belong to him in whose homage the tenant was, and to whom the lands must return when the feudal donation to the tenant was spent."

See further as to the law of rent-charges, post, bk. v. c. 1.

(*r*) 2 Bl. Com. 42; Litt. s. 217.

(*s*) Litt. s. 218.

(*t*) Ib. s. 217. By 18 & 19 Vict. c. 15, ss. 12–14, any annuity or rent-charge granted after the passing of that Act (26th April, 1855), *otherwise than by marriage settlement or will*, for a life or lives, or for any estate determinable on a life or lives,—shall not affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, until a memorandum thereof, such as the Act describes, shall be registered in the Common Pleas. By 22 & 23 Vict. c. 35, s. 10, a

from a rent-charge of part

where the owner of the rent has neither seigniory nor reversion, nor any such express power of distress as above described. Thus, in either of the cases of rent-charge we have just mentioned, if no clause of distress were inserted in the deed, the rent would be rent-seek (*u*).

We must be careful, however, to distinguish here between the two kinds of rent last above described and an *annuity*, which (unless charged upon some real estate) is a yearly sum chargeable only upon the *person* or upon the personal estate of the grantor (*x*). Therefore if a man by deed grant to another the sum of 20*l.* per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it, but it is a mere personal annuity (*y*) and does not belong to the class of things real; though, (by an anomaly which has sometimes led to confusion,) a man may have an estate of inheritance in it; that is, it may be made descendible to his heirs, while personalty in general can devolve only upon the executors or administrators (*z*).

There are also other species of rents mentioned in the books; which are, however, when examined, reducible to the three above enumerated. *Rents of assize* are rents at which the freeholders or copyholders of a manor have held under the lord from time immemorial (*a*); [and they cannot be departed from or varied; those of the free-

of the hereditaments charged therewith, shall not extinguish the whole rent-charge; but shall only bar the right to recover any part of it out of the hereditaments released. Before this Act a rent-charge in effect extinguished by a of any part of the he charged. (See Co. Litt. 147 b.)

(*u*) Litt. ss. 217, 218.

(*x*) Co. Litt. 144, 20 a, and n. (1), by Harg. As to the manner of recovering the arrears of an annuity charged on real estate, see Sollory *v.* Leaver, Law Rep., 9 Eq. Ca. 22.

(*y*) 2 Bl. Com. 40. As to the in which a grant of this kind shall be construed as a rent-charge, Co. Litt. 147 a.

(*z*) Co. Litt. 2 a. According to e (vol. ii. p. 40), "a man "may have a real estate in it." But it seems clear that this can only be in the sense of an estate of , and that an annuity no other respect of realty; (see Co. Litt. 20 a; Aubin Daly, 4 B. & Ald.

(*a*) 2 Inst. 19.

[holders being frequently distinguished as *chief rents* (*reditus capitales*), and both sorts being indifferently denominated *quit rents* (*quieti reditus*), because thereby the tenant was quit and free of all other services. When these payments were received in silver or white money, they were antiently called white rents, *reditus albi*, in contradistinction to rents reserved in grain or baser money, which were called *reditus nigri*, or black mail (*c*).] Quit rents, being connected with a tenure by fealty, are consequently rent service; from which it follows that the lord is entitled, as of common right, to distrain for them when they fall into arrear (*d*). *Rack rent* is a term expressive only of the proportion a rent bears to the value of the tenement on which it is charged (*e*): the rent being so termed when it is of the full value of the tenement or near it. A *fee farm rent* is where an estate in fee is granted subject to a rent in fee, of at least one-fourth of the value of the lands at the time of its reservation (*f*); and such rent appears to be called fee farm, because a grant of lands reserving so considerable a rent, is indeed only letting lands to farm in fee simple, instead of the usual method for life or years. It results from former explanations, that such a rent, if created by a subject since the statute of *Quia emptores*, can never be a rent service, for no fealty can be due to the grantor (*g*); but it may be either a rent-seck or a rent-charge (*h*).

These are the general divisions of rent; but though their correct apprehension is still of importance, the dif-

(*c*) 2 Inst. 19.

(*d*) 2 Watk. Cop. 191.

(*e*) 2 Bl. Com. p. 43.

(*f*) Co. Litt. 143 b. Blackstone (ubi sup.) defines a fee farm rent as a *rent-charge* issuing out of an in fee of at least one-fourth, ., but apparently by a misconception of Lord Coke's meaning. See Co. Litt. by Harg. 144 a, n. (5).

(*g*) Vide sup. p. 234. According to Mr. Hargrave, a fee farm rent be created by a subject since statute; it being in his opinion essential to the definition of a fee farm rent, that it should be a rent-service. See Co. Litt. by Harg. 144 a, n. (§).

(*h*) Doug. 627, note (1); and see Litt. 217.

ference which formerly existed as to the remedies to pursued in case of their non-payment, is, for practical purposes, nearly at an end. For it has been provided by stat. 4 Geo. II. c. 28, s. 5, that any rent-seek, rent of assize, or chief rent, which has been duly answered or paid for a limited period prior to the date of that Act, or which shall at any time thereafter be created,—may be recovered by the remedy of distress in the same manner as if such rent had been reserved upon a lease (*i*).

With respect to the manner of creating rents, it may be observed generally, that the methods are two—that is to say, the owner of land may either grant thereout a rent, or he may grant the land itself, subject to a rent (*k*). Rent-charge or rent-seek may be constituted in either of these ways; rent service in the latter only (*l*).

[Rent is due and payable upon the land from which it issues,—that is, if no particular place be mentioned in the reservation (*m*). But in the case of the sovereign, the payment must be either to the crown officers at the Exchequer, or to a receiver in the country (*n*). And, strictly, rent is demandable and payable before the time of sunset of the day whereon it is reserved (*o*), though some have said that it is not absolutely due till midnight (*p*).]

By the common law, if the estate or interest of the person entitled to rent came to an end, in the interval between one of the days of payment and another (as where it determined by death, supposing him to be tenant for life,) the periodical sum then accruing was entirely lost to him and his representatives (*q*); and supposing the rent itself not to determine, but to continue payable

(*i*) See Musgrave *v.* Emmerson, 16 L. J. (Q. B.) 174.

(*k*) Anon. *v.* Cooper, 2 Wils. 375.

(*l*) See Litt. ss. 217, 218.

(*m*) Co. Litt. 201 b.

(*n*) 4 Rep. 73.

(*o*) Co. Litt. 202 a; 1 Anders. 253. See Acocks *v.* Phillips, 5 H. & N. 114, and Tutton *v.* Darke, ib. 647.

(*p*) See 1 Saund. 287; Prec. Chanc. 555; Salk. 578; Lord Rockingham *v.* Penrice, 1 P. Wms. 178.

(*q*) See Jenner *v.* Morgan, 1 P. Wms.

to some person in remainder or reversion, the whole sum accruing in respect of such interval would belong to that person, though the greater portion of such period should have elapsed in the time of his predecessor. But, in extension of some prior enactments, passed to amend the rule of the common law on this head, it has now (as in a previous part of this volume we have already had occasion to mention) been provided by "The Apportionment Act, 1870" (33 & 34 Vict. c. 35), that after the passing of that statute, all rents and other periodical payments in the nature of income, (whether reserved or made payable under an instrument in writing or otherwise,) shall be considered as accruing from day to day, and shall be *apportionable* in respect of time accordingly (*r*). And to what we then said, we may here add, that the apportioned part of the same shall be payable, in the case of a continuing rent, annuity, or other such payment, as soon as the entire portion of which it forms part shall become due, and not before; and in the case of a rent, annuity, or other such payment, determined by re-entry, death, or otherwise, as soon as the next entire portion would have been payable, and not before (*s*): and that all persons entitled to the same and their respective representatives (and also the representatives and assigns of persons whose interests determine with their own deaths), may recover such apportioned part as they might have done the entire portions, if entitled thereto respectively (*t*). The Act, however, contains a proviso, that the entire or continuing rent, including such apportioned part, shall be recovered by the heir or other

(*r*) 33 & 34 Vict. c. 35, s. 2. This Act refers in its preamble to the previous enactments on this subject contained in 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22; 6 & 7 Will. 4, c. 71; 14 & 15 Vict. c. 25; 23 & 24 Vict. c. 154. As to its construction, see Whitehead *v.* Whitehead, Law Rep., 16 Eq. Ca. 528; Capron *v.* Capron, ib. 17 Eq. Ca. 288; In re Cline's Estate, ib. 18 Eq. Ca. 213.

(*s*) Ibid.

(*t*) Sect. 4.

person who, had the rent not been apportionable, would have been entitled to the entire portion; and that such apportioned part shall be afterwards recoverable by action from such heir or other person, by the executors or other persons entitled under the Act to claim the same (*u*).

There is also another kind of apportionment, as where the tenant under a lease has been evicted of part of the land out of which the rent issues, by a person having title paramount to that of the lessor; or where part of it has been surrendered by the tenant to the lessor; or where the lessor has alienated the reversion as to part. In all these cases the rent must be apportioned (*v*); and so much of it only shall be payable to the lessor, as corresponds with the value of what is still held by the tenant under him; though where the tenant has been tortiously expelled by the act of the landlord himself even from a part of the premises only, there shall be no apportionment, but the whole rent will be suspended so long as the expulsion continues (*x*). The doctrine of apportionment is not, it may be remarked, confined to rent, but applies to some other kinds of incorporeal hereditaments (*y*). For if a man, seised of forty acres of land, to which common of pasture is appurtenant, aliene five acres of it to another, the alienee will be entitled to common *pro tanto*; that is, for all his commonable cattle *levant* and *couchant* on the five acres (*z*).

With regard to the remedies for the recovery of rent, including the doctrine of distress—these belong properly to a subsequent part of these Commentaries; where we

(*u*) 33 & 34 Vict. c. 35, s. 4. The Act has no application to annual sums made payable by any policy of assurance; nor to any case in which an express stipulation has been made that no apportionment shall take place. (Sects. 6, 7.)

(*v*) Co. Litt. 148 a; Bliss *v.* , 5 Barn. & Ald. 876.

(*x*) Gilb. Rents, 178; Neale *v.* Mackenzie, 1 Mee. & W. 747.

(*y*) As to apportionment of rent on lease or of fine on thereof, reserved on acquired under the Church Building Acts, see 17 & 18 Vict. c. 32.

(*z*) Wyat Wild's case, 8 Rep. 78 b.

shall treat of civil injuries, and the means by which redress for them may be obtained (*a*).

Having thus taken notice of such particular incorporeal hereditaments as appeared to be fit for the present to engage our attention, we shall now advert to some of the principal points of learning relative to this division of things real, considered in a general view; that is to say, without reference to the individual species of which they are composed.

In the first place then we may remark, that many incorporeal hereditaments are capable either of being annexed as an accessory to some hereditament corporeal or of existing independently, and *per se*; being described, in the former case, as *appendant* or *appurtenant*, in the latter, as *in gross* (*b*). But to be connected as principal and accessory, things must be of a nature suitable to that relation, and therefore corporeal hereditaments cannot be appendant or appurtenant to such as are corporeal, nor incorporeal (generally speaking) to incorporeal (*c*). Where, however, the connection of principal and accessory exists, the effect is that the thing appendant or appurtenant will pass (without any particular mention of it) by any conveyance or alienation of the land to which it is annexed; and this whether the land be conveyed "with its appurtenances" or not (*d*). But if the principal be expressly conveyed without the accessory, or the accessory without the principal—as in some instances may be

(*a*) Vide post, bk. v. c. 1.

(*b*) Co. Litt. 121 b, 122 a. The *accessorium* of the civil law is that which answers best to our terms of *appendant* or *appurtenant*. Co. Litt. by Harg. 121 b, n. (6). As to the difference between these terms, Lord Coke remarks, "that *appendants* are ever by prescription, but *appurtenants* may be created, "in some cases, at this day."—Co. Litt. 121 b.

(*c*) Ib. n. (7); Potter *v.* North, 1 Vent. 386; Plowd. 85, 168, 170; Capel *v.* Buszard, 6 Bing. 161.

(*d*) Co. Litt. ubi sup.; Barlow *v.* Rhodes, 3 Tyr. 280; James *v.* Plant, 4 Ad. & El. 749; et vide sup. p. 487.

done—the accessory becomes thereafter, in either case, a thing in gross (*e*).

Incorporeal hereditaments are not, in a strict and proper sense, the subjects of *tenure*, like those of the corporeal kind (*f*); but they satisfy, in general, the legal description of *tenements*, and are expressly held to be within the meaning of that word as used in the statute *De donis*, so as to be capable of being *entailed* (*g*). And where an incorporeal hereditament is appendant or appurtenant, it will of course, in respect of the land to which it is annexed, be subject to all the rules of tenure.

The same *estates* may be had in incorporeal as in corporeal hereditaments, and in many respects they are upon the same footing with regard to *title*, or the manner in which estates are acquired or lost. More particularly we may notice, that though the former subjects of property are intangible in their nature, yet they are substantially in the same predicament with the latter, even in regard to some of those laws of title which are founded upon an actual *seisin* or occupation. Thus with respect to *descent*, the rule of *seisina facit stipitem* had the same application to things incorporeal as to corporeal (*h*); that is, it governed all descents which took place on a death prior to the 1st of January, 1834—the date of the Inheritance Act (3 & 4 Will. IV. c. 106) (*i*). For if a man who died before that day had what is *equivalent* to corporeal seisin in hereditaments that were incorporeal and in gross,—if, for example, in the case of a rent, he had obtained the actual receipt of

(*e*) Plowd. 381; Com. Dig. Append. and Appurt. (D.); 2 Saund. 32.

(*f*) Co. Cop. 87, Co. Litt. 20 a; Bac. Ab. Tenure (A.). It is observable, however, that under the feudal system, as it formerly prevailed on the continent, not only lands, but "casual rents, such as the profits of "a toll, the fares paid at ferries, the "salaries of offices, and even pen-"sions, were held as *fiefs*, and mili-"tary service was performed on "account of them."—Robertson's Charles V. vol. i. n. (6).

(*g*) Vide sup. p. 242.

(*h*) Vide sup. p.

(*i*) No descent prior to that is within the operation of the Inheritance Act; vide sup. p. 391, n.

it—such constructive seisin made him the root of descent with respect to these hereditaments, though he was not himself the purchaser (*k*). But upon successions since that Act, the rule which has been mentioned as to corporeal, obtains also as to incorporeal hereditaments, viz. that descent is in all cases to be traced from the purchaser (*l*). So hereditaments of the latter as well as of the former description, fall within the doctrine of *special occupancy* (*m*). For though it seems that at common law there could be no title by *common* occupancy to things of which no corporeal or actual seisin could be had, yet the heir might take as *special* occupant (*n*); and incorporeal hereditaments are now expressly included in all the legislative provisions with respect to estates *pur autre vie*, which we had occasion to notice in a former part of the work (*o*).

But on the other hand, in some important particulars the law of title to incorporeal things, differs from that which applies to things corporeal. For the former cannot in their nature pass by *feoffment*, this implying, as we have seen, an actual livery (*p*). But they have always been capable in every instance of passing by *grant* (*q*); and

Co. Litt. 15 b. It is not, however, every incorporeal hereditament which will admit of this constructive possession. Thus Lord Coke makes an express exception of *Dignities*, in which he says a man cannot by any act "gain more "actual possession (if it may be so "termed) than by law descended "to him." (Ratcliffe's case, 3 Rep. 42 a.) It is also to be observed with regard to such incorporeal hereditaments as are *not* in gross, but appendant or appurtenant (vide sup. pp. 653, 654), that they follow the descent or conveyance of the land to which they are annexed; Co. Litt. by Harg. 15 b, n. (1); Watk. p. 60, 61.

(*l*) 3 & 4 Will. 4, c. 106, ss. 1, 2; vide sup. p. 391.

(*m*) Vide sup. p. 450.

(*n*) Bearpark *v.* Hutchinson, 7 Bing. 186; see 2 Bl. Com. 259.

(*o*) Bearpark *v.* Hutchinson, ubi sup.; vide sup. pp. 449 et seq.

(*p*) Vide sup. p. 505.

(*q*) 2 Sand. Uses, 33, 36, 37, where the only exceptions mentioned are the cases in which the policy of the law forbids *any* assignment at all, as in the case of an office of trust and confidence; (see Welcome *v.* Upton, 6 Mee. & W. 536). A *grant*, it will be recollected (vide sup. p. 512), implies a deed, i. e. an instrument under seal; and without a deed, an incorporeal hereditament will not

therefore they were said (like remainders and reversions of hereditaments corporeal) to *lie in grant*, and not *in livery* (*r*). In this, however, we refer not only to a grant properly so called, but also to a surrender, if by deed (*s*), and to a conveyance operating under the Statute of Uses (*t*); for every existing incorporeal hereditament may be limited to a use, and such use will be executed (as in the case of a conveyance of land) by the statute (*u*). Nor is it by grant alone, that title may be made to an incorporeal hereditament. This indeed is the only universal method; but there are others applicable to particular cases. For, first, rents may be created by *reservation* in a lease or other conveyance, as where a man seised in fee demises land to another for life or years, the latter yielding and paying for the same a certain sum of money (*x*). Again, there are certain incorporeal hereditaments which may be claimed by *custom*; as for all the inhabitants of a certain hamlet to have a right of way over a certain field for a particular purpose (*y*). This species of title, however, is subject to a very important restriction, viz. that no man can in this way claim a *profit à prendre* in the land of another (*z*): and, accordingly, a custom for all the inhabitants of a certain hamlet to take from a private close, for the purpose of manure, sand drifted from the sea, was held to be bad in law (*a*). Besides these titles, there is also the claim by *prescription*, which applies to almost every kind

pass. (See Wood v. Leadbitter, 13 Mee. & W. 838.)

(*r*) Formerly, on the other hand, corporeal hereditaments were said (*à converso*) to lie in livery and not in grant. But this, as we have seen, is now altered by a modern statute; vide sup. p. 513.

(*s*) See Co. Litt. 336 a.

(*t*) Vide sup. pp. 534 et seq.

(*u*) 2 Sand. Uses, pp. 33, 49, 59, 111; sup. p. 369.

(*x*) Bac. A. Rent, C.; Litt. s. 217; see Doe v. Lock, 2 Ad. & El. 705, 743; Wickham v. Hawker, 7 Mee. & W. 72.

(*y*) Coleridge's Blackstone, ii. p. 36, n. (14).

(*z*) Gateward's case, 6 Co. 596; Constable v. Nicholson, 14 C. B., N. S. 239; Austin v. Amhurst, Law Rep., 7 Ch. D. 689; Rivers v. Adams, ib., 3 Ex. D.

(*a*) Blewitt v.
& W. 431.

of hereditament incorporeal (*b*); and as well to those which are appendant or appurtenant, as to those which are in gross (*c*). And this last species of title involves so many points of nicety, as to demand a more particular explanation than we have bestowed on any of the former.

The subject of prescription indeed has been in some measure unavoidably anticipated, in so far at least that it has been stated to be a title by long usage. But we are now to examine its nature more closely, and, as a preliminary point, we would remark, that though depending on usage, it is not to be confounded with custom. The distinction between custom—of which we had occasion to inquire at large in a preceding part of these Commentaries (*d*)—and prescription, is this, that custom is properly a *local* usage, and prescription a *personal* one, attaching to a man and his ancestors, or those whose estate he has (*e*). [As, for example, if there be a usage time out of mind in the parish of Dale, that all the inhabitants of that parish may dance on a certain close at all times for their recreation,—which is held to be a lawful usage—this is strictly a custom, for it is applied to the *place* in general, but not to any particular *persons* (*f*): but if the tenant who is seised of the manor of Dale in fee alleges, that he and all those whose estate he hath in the said manor have used time out of mind to have common of pasture in such a close; this is properly called a prescription, for this is a usage annexed to the *person* of the owner of this estate.]

" *et tempore, substantiam ab authoritate legis.*"—Co. Litt. 113 b. The title of prescription was well known to the Roman law by the name of *usucapio*. (Ff. 41, 3, 3.) And see 2 Bl. Com. 264, where the subject of prescription is discussed at large.

The title by prescription, however, at common law or under the stat. 2 & 3 Will. 4, c. 71, to be presently noticed), applies to *no other* than incorporeal hereditaments. (Wilkinson v. Proud, 11 Mee. & W. 35.)

(*d*) Vide sup. p. 52.

(*e*) Co. Litt. 113 b; Potter v. North, 1 Vent. 386; 2, Bl. Com.

(*f*) Abbot v. Weekly, 1 Lev. 176.

The subject of prescription has been newly regulated by 2 & 3 Will. IV. c. 71; but the provisions of this statute are of a nature by no means to supersede the former state of the law in regard to this species of title; and prescription will be best understood by contemplating it in two distinct points of view—first, as it exists at common law; secondly, as it is modified by the above Act.

First, with respect to prescription *at common law*, the following points appear principally to deserve attention: 1. This title is always founded on the actual usage of enjoying the thing in question; and without this, a mere claim, however often repeated or long continued, and whether its validity has been questioned or not, will not suffice to establish a prescriptive right (*g*). 2. The enjoyment on which a prescription is founded, must have been constant and peaceable; for, as a general rule, when it has been subject to interruption and dispute, no title by prescription arises. Yet where the right is shown to have once attached in consequence of an uniform and tranquil usage for a sufficiently long tract of time, a wrongful interruption of the enjoyment during a subsequent period of comparatively short duration (as for ten or twenty years) will not destroy the prescription (*h*). 3. As to the length of time sufficient to establish the right, the rule of the common law is, that there must have been a usage *from time immemorial*, or, as it is technically termed, *from time whereof the memory of man is not to the contrary*; which period (as before shown in our remarks upon *custom*) refers to so remote an era as the beginning of the reign of Richard the first (*i*). And therefore if the usage can be shown to have commenced at any time since that period,

(*g*) But a right more extensive than the actual user may, in some cases, be presumed. See Manifold v. Pennington, 4 Barn. & Cress. 161; Rutzen v. Lloyd, 4 Ad. & El. 456; Jones v. Richards, 6 Ad. & El. 532.

(*h*) Co. Litt. 114 b; 2 Inst. Com. Dig. Prescription, E.

(*i*) Co. Litt. 115 a.

the prescription (where it is claimed as at common law) is destroyed (*k*). But a commencement shown prior to the reign of Richard the first, would constitute no objection; for all time prior to that era is considered as out of the time of legal memory (*l*). Supposing no evidence to be given as to the time at which the usage commenced, but that it appears, either by the testimony of living witnesses, or by any other means of proof (*m*), that it has had continuance for a period of *twenty years* or more, this will in general amount, at common law, to a presumption that it is immemorial (*n*); so far, at least, as to sustain the prescription, supposing no circumstances of a contrary tendency to appear (*o*); and even proof of a shorter continuance than twenty years will have the same effect, if corroborated by other attendant circumstances indicative of the existence of an antient right (*p*). But the presumption of immemorial right, that would otherwise arise from an enjoyment of twenty years, or any other period within legal memory, will be defeated by showing that such enjoyment took place by virtue of a grant or licence from the party interested in opposing it, or that it was without his knowledge during the whole time that it was exercised (*q*). 4. Every prescription must be both certain and reasonable; therefore a prescription to pay for tithes one penny *or thereabouts* for every acre of arable land, or to take as much clay *as shall be required* for making bricks at a certain kiln out of another's field, is bad in law (*r*); and

(*k*) See Bryant *v.* Foot, Law 3 Q. B. 497; Mills *v.* Col-, ib., 3 C. P. 575.

(*l*) 9 Rep. 27 b; Com. Dig. Prescription, Pract. lib. ii. c. 22; Stark. Ev. 1205.

(*m*) Stark. Ev. 1217, 1st edit.; Co. Litt. 115 a.

(*n*) This doctrine applies, it will be observed, to a prescription at common law *only*. As to the case of a claim under the Prescription Act, vide post, p. 693.

(*o*) Rex *v.* Joliffe, 2 Barn. & Cress. 59; Hill *v.* Smith, 10 East, 476; Daniel *v.* North, 11 East, 372; Chad *v.* Tilsed, 2 Brod. & Bing. 403.

(*p*) Stark. Ev. 1217, 1st ed. See Bright *v.* Walker, 4 Tyr.

(*r*) Com. Dig. Prescription, E. 3; Clayton *v.* Corby, 5 Q. B. 416; Hilton *v.* Granville, ib.

thus, too, a surplice fee claimed on marriage was held unsustainable on the ground that, according to the value of money at the supposed origin of the prescriptive right, it was *excessive in amount* (*s*). 5. All prescription at common law, must be laid either in a man and *those whose estate he hath* in certain lands (as in the example above given of a prescriptive common of pasture), which is called prescribing in a *que estate* (*t*), or it must be in a man *and his ancestors* (*u*). [And here this distinction is to be made—that if a man prescribes in a *que estate* nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence or appendix of an estate, with which the thing claimed has no connection; but if he prescribes in himself and his ancestors, he may prescribe for anything whatever that might be the subject of grant (*x*). And, formerly, a man might by the common law have prescribed for a right which had been enjoyed by his ancestors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations, 32 Hen. VIII. c. 2, it was enacted, that no person should make any prescription by the seisin or possession of his ancestor, unless such seisin or possession had been within threescore years next before such prescription made. 6. A prescription in a *que estate* must always be laid in him that is tenant of the fee. A tenant for life, for years, or at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates (*y*). For as prescription is usage beyond time of memory, it is absurd

(*s*) See Bryant v. Foot, Law R., 3 Q. B. 497.

(*t*) See Richards v. Fry, 7 Ad. & El. 704; Padwick v. Knight, 22 L. J., Exch. 198.

(*u*) But a prescription may also be in a body corporate, and their "body," says Lord "For as a natural "to have ancestors, so a "politic or corporate is said to have "predecessors." And see Mellor v. Spateman, 1 Saund.

(*x*) Co. Litt. 121 a.

(*y*) 4 Rep. 31, 32.

[that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man; and therefore the tenant for life, or for other estates short of the fee, must prescribe under cover of the tenant in fee simple. As if tenant for life of a manor would prescribe for a right of common, as appurtenant to the same, he must allege that John Stiles was seised in fee of the manor; and that he and all those whose estate he had, had immemorially used to have this right of common appurtenant to the said manor; and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 7. A prescription cannot lie for a thing which could not be raised by grant; for the law allows prescription only to supply the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for as such claim could never have been good by any grant, it shall not be good by prescription (*z*). 8. Another rule is, that what is to arise by matter of record, cannot be prescribed for: such as, for instance, the right to forfeitures—being among the franchises to which we before made brief allusion in the course of this chapter (*a*): for these forfeitures are found by the inquisition of a jury, and so made a matter of record: to which prescription, (which is a mere usage *in pais*, says Lord Coke,) cannot extend (*b*). But the franchises of treasure trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record (*c*). 9. Lastly, we may observe that a person having title to anything by prescription, is not to be considered as being himself the purchaser, so as to make it descendible to his

(*z*) Potter *v.* North, 1 Vent. 387.

(*a*) Vide sup. p. 665.

(*b*) 2 Bl. Com. 265; Co. Litt. 114 a; Case of Abbott of Strata Marcella, 9 Rep. 24 a. It will be subject of forfeitures was of much more importance than at the present day; and in particular with reference to forfeitures for felony and
- both now abolished.

(*c*) Co. Litt. 114 b.

[heirs general, according to the ordinary rule of inheritance (*d*); for prescription, inasmuch as it presupposes a grant, is in strictness rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*: but the rule on this subject is, that where a man prescribes for anything, (for example, a right of way,) in himself and his *ancestors*, it will descend only to the blood of that line of ancestors in whom he so prescribes: but if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; —for every accessory followeth the nature of its principal.]

Such being the nature of prescription at common law, we are next to regard it as regulated *by statute*, viz., by 2 & 3 Will. IV. c. 71; a subject which the explanations that have been already given, will enable us more easily to apprehend. This statute is described in its title, as an Act "For shortening the time of prescription in certain "cases," and originated in a reasonable dissatisfaction with the rule, which required an enjoyment from "time immemorial" (in the legal sense of that term) as the indispensable foundation in every case of a prescriptive right. The effect of that rule (we have seen) was, that while, in general, an enjoyment for even *twenty* years sufficed to sustain a claim by prescription, because it constituted a presumption of immemorial antiquity, yet—if accident should supply the adverse party with the means of proving that, at any period subsequent to the commencement of the reign of Richard the first, the alleged right did not in fact exist—the claimant would be defeated, even though he could prove that the usage had lasted for centuries. To obviate the injustice and inconvenience resulting from this doctrine, the Act in question was passed; and its general plan is to dispense (in all the ordinary cases of prescription) with the necessity of making out an immemorial usage,

either by presumption or otherwise; and to allow an enjoyment for a certain period to constitute a direct and intrinsic right.

In pursuance of this view, it provides, with respect to rights of common "and all other profits or benefits to be "taken and enjoyed from or upon any land"—with the exception, however, of tithes, rents and services, which it leaves as at common law,—that where there shall have been an enjoyment of them by any person claiming right thereto (*e*), without interruption (*f*), for *thirty* years (*g*) next before the commencement of any action upon the subject (*h*), the prescriptive claim shall no longer be defeated (as it would have been before the Act), by showing only that the enjoyment commenced at a period subsequent to the era of legal memory. There is a proviso, however, that it may be defeated in any other way in which it was defeasible before the statute passed (*i*). And therefore a case of thirty years' enjoyment would still be satisfactorily answered, by showing that it was without the knowledge of the adverse party, or that it was by his mere licence or permission; for either of these circumstances would, before the statute, have rebutted the presumptive right (*k*). It is also provided, that the time during which the adverse party shall have been an infant, idiot, non compos mentis, feme coverte, or tenant for life, or during

(*e*) See Tickle *v.* Brown, 4 Ad. & El. 369; Kinloch *v.* Nevile, 6 Mee. & W. 795; Magor *v.* Chadwick, 11 Ad. & El. 584.

(*f*) See Onley *v.* Gardiner, 1 Horn. & Hurl. 381; Eaton *v.* Swansea Waterworks Company, 20 L. J., Q. B. (N. S.) 482; Carr *v.* Foster, 3 Q. B. 581. No act or matter is to be deemed an interruption, unless submitted to and acquiesced in for the space of one year after notice;

(*g*) See Richards *v.* Fry, 7 Ad. & El. 698; Wright *v.* Williams, Tyr. & Gr. 375.

(*h*) See Bailey *v.* Appleyard, 8 Ad. & El. 161, 778; Parker *v.* Mitchell, 11 Ad. & El. 788; Clayton *v.* Corby, 5 Q. B. 415; Ward *v.* Robins, 15 Mee. & W. 237.

(*i*) See Mill *v.* The Commissioners of the New Forest, 18 C. B. 60.

(*k*) See Daniel *v.* North, 11 East, 372; Bright *v.* Walker, 4 Tyr. 509; Kinloch *v.* Nevile, 6 Mee. & W.

which any action as to the claim shall have been pending and diligently prosecuted,—shall be excluded in the computation of this period of thirty years (*l*). But where there has been an enjoyment for as much as *sixty* years, the claim is to be absolute and indefeasible, except only where proof can be brought forward that such enjoyment took place under some consent or agreement in writing, expressly given for the purpose; while, on the other hand, if the period of enjoyment shall have been less than thirty years, it is to be wholly unavailable, even to raise the slightest presumption of right. In addition to these regulations as to the time for a prescription, there are others as to the manner of making it, and among them the following,—that he who prescribes under this Act shall not be required in any case to claim as in right of the owner of the fee (*m*).

In addition to these enactments with regard to prescriptive rights of common and the like, the statute of 2 & 3 Will. IV. c. 71, makes similar provisions with respect to another class of incorporeal hereditaments, viz. as to any "way or other easement (*n*), or any watercourse, or the "use of any water, to be enjoyed upon, over, or from "any land or water" (*o*), "and also as to the access or use "of light to and for any dwelling-house, workshop, or "other building" (*p*). But the periods constituting a prescriptive right in the case of ways or other easements, and waters, are *twenty* and *forty* years, in lieu of thirty and sixty respectively; and an uninterrupted enjoyment

(*l*) 2 & 3 Will. 4, c. 71, s. 7. See Pye v. Mumford, 11 Q. B. 666.

(*m*) Sect. 5.

(*n*) See Battishill v. Reed, 18 C. B. 696. As to the *passage of air*, see Webb v. Bird, 13 C. B. (N. S.) 841: as to use of land for the purposes of *mere pleasure*, see Mounsey v. Ismay, 3 H. & C. 486; Mayor of Saltash v. Goodman, 5 C. P. D. 431; 7 App. Ca. 633; as to an easement of *support*, see Angus v. Dalton, Law Rep., 3 Q. B. D. 85; on app., 4 Q. B. D. 162; and in H. L., 6 App. Ca. 740.

(*o*) See Beeston v. Weate, 5 Ell. & Bl. 986; Murgat 7 Ell. & Bl. 391.

(*p*) As to a prescription for li under this statute, see Warwick, 3 Exch. 552; don v. Burrows, 12 Ch. Div.

of lights for *twenty* years, constitutes an absolute and indefeasible right to them (*q*), any local usage or custom to the contrary notwithstanding (*r*). There is moreover a proviso as to ways and watercourses, that when the land or water in respect of which the claim is made has been held for term of life or exceeding three years, such term shall be excluded from the computation of the forty years, in the event of the person who may be entitled in reversion resisting the claim within three years after the term determines (*s*).

Besides those which have been above noticed, there still remains another point of title appropriate to incorporeal as distinguished from corporeal hereditaments; viz. that the former are capable of *extinction*, in a manner peculiar to themselves. Thus, they may be extinguished by *release* (*t*); as when a person entitled to common, releases it to the owner of the soil over which it is claimed (*u*). And after disuse of them for twenty years, a release will in general be presumed (*x*). So they may be extinguished by *unity of seisin*; as where the person entitled to a way or common becomes seised in fee, by purchase or otherwise, of the land which is subject to the right. For the dominion of the soil itself, and of an incorporeal right relating to the same soil, cannot in general subsist together

The claim (whether in respect of a way or other easement, or of water or light) may, however, as in the case of a claim of common, be defeated by showing that the enjoyment took place under a consent or agreement in writing (2 & 3 Will. 4, c. 71, s. 5); and see Seddon *v.* Bank of Bolton, 19 Ch. Div. 462.

(*r*) See Truscott *v.* Merchant Tailors' Company, 11 Exch. 855. As to interruption, within this section, see Plasterers' Company *v.* Parish Clerks' Company, 20 L. J. (Exch.) 362; Glover *v.* Coleman, Law Rep., 10 C. P. 108.

(*s*) 2 & 3 Will. 4, c. 71, s. 8.

(*t*) Co. Litt. 280 a, 270 a; Litt. ss. 479, 480; see Lovell *v.* Smith, 3 C. B. (N. S.) 127.

(*u*) As to the extinguishment of common by a release of it as to *part* of the land over which it is claimed, or by purchase of part, see Benson *v.* Chester, 8 T. R. 401.

(*x*) See Moore *v.* Rawson, 3 Barn. & Cress. 339; Ward *v.* Ward, 7 Exch. 838; Carr *v.* Foster, 3 Q. B. 581; Cook *v.* Bath, Law Rep., 6 Eq. Ca. 177.

in the same individual, because as soon as they are combined in his person, the latter right, being merely of a particular and subordinate kind, is absorbed and extinguished in the superior title of general ownership (*y*). To this, indeed, there is an exception in the case of franchises; which, as before remarked, are of a nature *collateral* to the inheritance itself, and are consequently not affected by unity of seisin (*z*). Even these, however, may be extinguished by a re-union with the Crown, from which they emanated, or by forfeiture for *misuser*, that is, such use of them as is contrary to the express or implied condition on which the royal grant may have proceeded; or by forfeiture for *non-user*, as if a vill was incorporated by the king, before the commencement of the period of legal memory, and that franchise has never been acted upon since (*a*). Lastly, we may remark as to some particular species of incorporeal hereditaments, *viz. lights* and *water-courses*, that, as they are acquired by mere occupancy, they are in like manner capable of being extinguished after their acquisition, by a simple act of abandonment; that is, by the mere discontinuance of the enjoyment, though for a period short of twenty years: provided, however, that the abandonment be absolute,—for if it take place under circumstances which imply the intention of future resumption within a reasonable time, the right in that case will not be lost

(*y*) See 4 Rep. 38 a; Cro. Eliz. 570; 3 Taunt. 24; Whalley *v.* Tompson, 1 Bos. & Pul. 371; Warburton *v.* Parke, 2 H. & N. 64. As to the extinguishment of a *right of way* by unity of possession, see Winship *v.* Hudspeth, 10 Exch. 5; Brett *v.* Clowser, 5 C. P. Div. 376; Allen *v.* Taylor, 10 Ch. Div. 355, Barkshire *v.* Grubb, 18 Ch. Div. 616.

(*z*) 4 Inst. 318. Vide sup. p. 672.

(*a*) 3 Cruise, Dig. 302. As to the re-grant of a franchise, chester *v.* Brooke, 7 Q. B.

(*b*) See Liggins *v.* Inge, 7 Bing. 692; Stokoe *v.* Singers, 8 Ell. & Bl. 31.

CHAPTER XXIV.

OF REGISTRATION OF TITLE TO LAND.

In former parts of the present volume we explained the methods by which estates in land are transferred from one owner to another, by the conveyance adapted for the purpose, according to the distinctions which have been adverted to in the course of our disquisitions. But in these conveyances, however otherwise effectual and convenient, there is certainly one palpable defect—the want of sufficient notoriety; so that purchasers or creditors cannot know, with any absolute certainty, what the estate and the title to it in reality are, upon which they are to lay out or lend their money. In the antient feudal manner of conveyance (by giving corporeal seisin of the lands), this notoriety was in some measure attained,—as it was, also, by the old Saxon custom of transacting all conveyances at the sheriff's county court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery (*a*). But since the disuse of both of these methods, our transfers of land have been private; and the inconveniences resulting from this were, at an early period, strongly felt; and more particularly in the important districts of Middlesex and Yorkshire. In the former

(*a*) 2 Bl. Com. p. 342. An antient method of similar character, though of partial application, is also by Blackstone, viz., the "general register which was established by King Richard I, for "the *stars*, or mortgages made to "of which Hoveden has preserved "a copy." And he conjectures that these mortgages being lodged for security at the Exchequer, gave at a later period a name to the Court of the Star Chamber sitting in the same

of these two counties (*b*), accordingly, a guard was provided against secret deeds, conveyances, wills, and other incumbrances, by the statute 7 Anne, c. 20, as it was for Yorkshire by the statutes 2 & 3 Anne, c. 4; 6 Anne, c. 20; and 6 Anne, c. 62 (*c*); and, subsequently, by the statute 8 Geo. II. c. 6. These enactments have provided that any deed, conveyance or devise which shall affect land of freehold tenure, situate in either of those two counties (but not including leases at rack rent, or for twenty-one years or under, where the actual possession goes along with them), shall be fraudulent and void against a subsequent purchaser or mortgagee (*d*), unless a memorial thereof shall have been *registered* in such manner and within such period as the Acts direct (*e*). The provisions of the above statutes have never been extended to other parts of England; and "it has been doubted by very competent judges whether more disputes have not arisen in those counties by the inattention and omission of parties, than prevented by the use of registers" (*f*); also, owing to the great increase and sub-division of tenements in Middlesex and Yorkshire, especially on building estates, the registers have grown very cumbrous and difficult to search through, the guiding particulars which were sufficient in the reign of Anne having now become glaringly insufficient, and necessitating in some cases weeks of searching through the register, upon the sale of a single house, *e. g.* in Kensington. Yet, in our own times, many have been of a

(*b*) As to parts of
see 15 Car. 2, c. 17, s. 8; Willis *v.* Brown, 10 Sim. 127.

(*c*) See Chadwick *v.* Turner, Law Rep., 1 Ch. App. 310.

(*d*) As to the construction of these Acts, see L'Neve *v.* L'Neve, 1 Ves. sen. 64; Tunstall *v.* Trappes, 3 Sim. 301; Doe *v.* Allsop, 5 A. & E. 142; Sumpter *v.* Cooper, 2 B. & Adol. 223; Queen *v.* Registrars of Middlesex, 7 Q. B. 156; Wollaston *v.* Hakewell, 3 Man. & Gr. 297; Hall *v.* Warren, (Dom. Proc.) 10 W. R. p. 66; Credland *v.* Potter, Law Rep., 18 Eq. Ca. 350; Bradley *v.* Riches, 9 Ch. Div. 212.

(*e*) As to the effect of a registered assurance, by the devisee of land in Middlesex or Yorkshire under a will *not* duly
see 37 & 38 Vict. c. 78, s. 8.

(*f*) 2 Bl.

different opinion, and it has been urged that a system of registration of title might be devised which, by the advantages it offered, should induce landholders to avail themselves of its provisions; and which by its operation should not merely protect purchasers and mortgagees against insecure titles, but also subserve the more general object of simplifying titles and facilitating the transfer of land in England.

These views have been at different times, and with more or less division of opinion, adopted by the legislature, and more than one attempt has been made to carry them into effect, but invariably without much success. Thus, in the year 1862, by the 25 & 26 Vict. c. 53, an office, under the name of the "Land Registry," was established; and by another Act of the same session, c. 67, enactments were made enabling persons under certain circumstances to obtain a judicial "declaration of title;" but the great and favourable expectations which attended the establishment of the "Land Registry" by the first of these statutes has not been altogether confirmed by experience, and little recourse has been had to their provisions. A fresh endeavour, however, has been recently made to devise a system of registration which shall be more effectual; and some extracts from the new statute, and from those which are contained in the Declaration of Title Act, 1862, may be here acceptable, though a detailed account of them would be improper in a work such as the present.

The Land Transfer Act, 1875, (38 & 39 Vict. c. 87,) deals separately with freehold and with leasehold property; and it affects only lands of freehold tenure as distinct from copyhold (*h*). We will first speak of the registration of *freeholds*.

As to these, it is provided by the Act that application to be put on the register, either in his own name or in the

(*h*) "Customary freehold" (as to which vide sup. p. 225) shall not, for the purposes of the Act, be deemed to be land of freehold tenure (38 & 39 Vict. c. 87, s. 2).

name of a nominee or nominees, may be made by any person 1, who has contracted to buy for his own benefit an estate in fee simple (subject or not to incumbrances); 2, who is entitled for his own benefit at law or in equity to such an estate; or, 3, who is capable of disposing for his own benefit by way of sale of such an estate (*i*). But in the case first supposed, he must have obtained the consent of the vendor to the application being made (*k*). In its terms, the application (which is to the registrar of the office established by the Act), is for registration as proprietor of the fee simple of the estate in question; and he may apply to be registered either with an absolute title or with one possessory only (*k*). Where the title required is "absolute," the application is not to be granted by the registrar unless he approves of the title (*l*); but where it is possessory only, then it is sufficient for the purpose of registration if the applicant shall give such evidence of title and serve such notices, as may for the time being be prescribed by rules made to carry out the Act (*m*).

With regard to the effect of registration, the Act provides that in the first registered proprietor with an absolute title shall vest an estate in fee simple, free from all other estates and interests (including those of the Crown), but subject to certain qualifications specified in the Act (*n*). These refer—1. To any incumbrances entered on the register. 2. To such liabilities, rights and interests as are declared by the Act not to be incumbrances (*o*). 3. To any unregistered estates, rights, interests or equities to which any persons may be entitled who claim under such proprietor. And it is further provided that registration with a possessory title only, shall have the same effect as registration with an absolute title, except that it shall not affect or pre-

(*i*) Sect. 5.
(*k*) Ibid.
(*l*) Sect. 6.
(*m*) Ibid.
(*n*) Sect. 7.
(*o*) See sect. 18, where the several liabilities, rights and interests (*not* incumbrances) are set forth in detail.

judice the enforcement of any estate, right or interest adverse to or in derogation of the proprietor registering (*q*). It is also enacted that, in certain cases, where the application is for an absolute title, and it appears to the registrar on examination that it can be established only for a limited period, or subject to certain reservations, the title may be registered as a *qualified* one (*r*). And, further, that on the registration being completed, the proprietor shall be supplied with a "land certificate" in a prescribed form, which shall, amongst other particulars, state whether the title of the proprietor mentioned therein is absolute or qualified or possessory (*s*).

With regard to *leaseholds*, a separate register is to be kept (*t*); and, as in the case of freeholds, application for registration, either in his own name or in the name of a nominee or nominees, may be made by one who has contracted to buy the leaseholds, or who is entitled thereto for his own benefit either at law or in equity, or who is capable of disposing of the same for his own benefit by way of sale (*u*). And where the lease under which the land is held is derived immediately out of freehold land, and the applicant for registration is able to submit for examination the title of the lessor, it may form part of the application that the registration shall contain a declaration of the title of the lessor to grant the lease under which the land is held (*u*). In a leasehold, however, as in a freehold, if the application be made by one who has only contracted to buy the land, the vendor must consent to its being made (*u*).

Every applicant for registration of leasehold land must deposit with the registrar the lease of the land, and no applicant or his nominee can be registered as proprietor until and unless the title thereto shall be approved by

38 & 39 Vict. c. 87, s. 8.
(*r*) Sect. 9.
(*s*) Sect. 10.
(*t*) Sect. 11.
(*u*) Ibid.

the registrar (*x*); nor if the application shall include a declaration of title, until and unless the lessor, after his title is examined by the registrar, is declared by him to have an absolute or qualified title to grant the lease in question (*y*).

With regard to the effect of registration of leasehold land, the Act provides that in the first registered proprietor who has obtained a declaration that the lessor had an absolute title to grant the lease, shall vest the possession of the land for all the estate therein described free from all other estates and interests (including those of the Crown), but subject to certain qualifications specified in the Act, viz.:—1. Covenants, express and implied, obligations and liabilities incident to the estate; 2, any incumbrances entered on the register; 3, liabilities, rights and interests declared by the Act not to be incumbrances; 4, unregistered estates, rights, interests and equities of persons claiming under the first registered proprietor (*z*). And, further, that registration as the proprietor *without* a declaration of title of the lessor shall have the same effect, except that in that case the registration is not to affect or prejudice any estate, right or interest affecting or in derogation of the title of the lessor to grant the lease under which the land is held (*a*). In the case of leaseholds, also (as in freeholds), in certain cases the declaration of the title of the lessor may be qualified only (*b*); and on registration the proprietor is to receive from the registrar an "office copy" of the registered lease, endorsed with a statement as to whether any declaration of title has been made, and as to any other particulars which may have been entered on the register (*c*).

With land registered under the Act according to the above distinctions, there may be subsequent dealings which may themselves also be registered or unregistered, and,

(*x*) Sect. 12.

(*a*) Sect. 14.

13.

according as they belong to the one class or the other, it is provided that certain consequences shall attach.

And, first, with regard to mortgages of registered land, either freehold or leasehold, every registered proprietor may charge such land with the payment of any principal sum of money at an appointed time, either with or without interest, and including a power of sale in default of payment (*d*). Such a charge is to be completed by a simple entry by the registrar on the register, who is to deliver to the proprietor of the charge a certificate in the prescribed form; and a registered charge, thus created, carries with it, by force of the Act, implied covenants for payment of principal and interest, as well as a right of entry and seizure of rents and profits in default of payment, and a power to enforce foreclosure or sale as if the land had been transferred by way of mortgage (*e*). And with respect to the *transfer* of registered land, whether freehold or leasehold, from one proprietor to another, the Act declares that it may be effected by a similar entry on the register, which shall confer on the transferee such an estate as mentioned in the Act, according as the transfer was for or without valuable consideration; and according as the land transferred has been registered with an absolute, qualified or possessory title, or (if leasehold) with a declaration of title absolute or qualified, or without any declaration at all. A simple entry on the register is also made sufficient to transfer a charge from one proprietor to another, and to evidence the transmission of interest arising on death, bankruptcy or marriage (*f*).

As to unregistered dealings with registered land, any person, whether the registered proprietor or not, with a sufficient estate in the land, may, subject to the maintenance of the estate and right of the registered proprietor, create estates, rights, interests and equities therein in the same

(*d*) 38 & 39 Vict. c. 87, s. 22. (*f*) Sects. 22,
(*e*) Sects.

manner as he might do if the land was not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land, may protect the same from being impaired by any act of the registered proprietor, by entering on the register such notices, cautions, inhibitions or other restrictions as in the Act mentioned (*g*).

It would be beyond our limits to explain the provisions of the Act which are intended to regulate and assist the registrar in matters of practice; but it may be right to add, with reference to the previous Act of 1862, that applications for the registration of an estate under it are not for the future to be entertained (*h*); and though a person interested in an estate registered under that Act may, if he please, re-register under the new statute, yet he is not obliged to do so, and until he does, the previous Act shall apply thereto, as if the more recent one had not been passed (*i*); and, finally, that as regards the proprietors of land in Yorkshire and Middlesex, the plan of the new Act is not attended with the inconvenience of subjecting them to two different systems of registration: for it is enacted that any land situate within the jurisdiction of the local registries in those counties (*j*), shall, if registered under the statute now in question, be exempt from the necessity of registration in the local registry (*k*).

The other Act mentioned above, viz., the 25 & 26 Vict. c. 67,—after reciting that it is expedient to enable persons having interests in land to obtain, in certain cases, a judicial declaration of their title so as to enable them to make an indefeasible title to persons claiming under them as purchasers for a valuable consideration (*l*),—directs

(*g*) Sect. 49.
(*h*) Sect. 125.
(*i*) Sect. 126.
(*j*) Vide sup. p. 699.
(*k*) Sect. 127.

(*l*) The word "land" in this Act shall not, unless the provisions require a different construction, include any incorporeal hereditament. (25 & 26 Vict. c. 67, s. 48.)

(among other things) that every such person as is authorized by the Act in that behalf, may make application by petition, in a summary way, for a declaration of title (*m*). And it proceeds to enact that the court, on hearing of the petition, and being satisfied that the petitioner has proved such a possession and stated such a title, as if established would entitle him to a declaration as prayed, shall make an order for an investigation of the title in the same way as if he had obtained, as vendor, a decree for a specific performance of an agreement for sale of the land in question, for the estate claimed in his petition (*n*). And that after such an investigation, if the court is satisfied that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, it shall (on the conditions in the Act mentioned) make an order, that, on some day not less than three months afterwards, a declaration shall be made establishing the petitioner's title; unless, in the meantime, cause is shown to the contrary (*o*): but that no such order shall be made, until the petitioner and his solicitor, and any other person whom the court may require, shall have made and filed an affidavit, that, to the best of their respective knowledge and belief, all instruments and papers relating to the title have been produced to the court, or that the cause of their non-production has been fully and fairly explained, and that all facts material to the title have been fully and fairly disclosed to the court; it being, however, also provided that such affidavit may be

(*m*) The persons by whom the application may be made are expressed in the Act to comprise "every person claiming to be entitled to land in possession for an "estate in fee simple in freehold "tenure, either absolutely or subject to any incumbrances, estates, "rights or interests, vested or contingent, or claiming to have a "power of disposing of land for his "own benefit for an estate in fee "simple in possession, either absolutely or subject to any incumbrances, estates, rights or interests, vested or contingent." (25 & 26 Vict. c. 67, ss. 1, 4.)

(*n*) Sect. 6.

(*o*) Sect. 8. As to the practice of the courts herein, see In re Roberts, Law Rep., 10 Eq. Ca. 402.

dispensed with or modified by the court, according to circumstances (*p*). In order to secure the object of apprising all proper persons of the opportunity of showing cause against the making of the declaration, it is further enacted, that a copy of the order shall be served on such persons, and deposited in such places, as the Act describes, for inspection; and that notice of such deposit shall be also affixed in such places as it describes (*q*): and that after such deposit has been made, the petitioner shall cause advertisements to be inserted, three times at least, in such newspapers and on such days as the court shall direct, stating the order, and also stating where any copy has been so deposited for inspection (*r*). And that, unless the last of such advertisements is made within four weeks next after the date of the order, the time thereby fixed for showing cause against the same shall be enlarged as the court shall direct (*s*). And further, that if no petition shall be presented against the proposed declaration of title within the time limited for that purpose, or if one has been presented, but the court is of opinion that no sufficient ground has been shown for refusing to make the declaration, then the court, upon being satisfied that all requisitions have been duly complied with, shall make a declaration that the petitioner has such title to the lands in question, as he sought to establish by his petition, or such title subject to any qualifications which it may deem necessary or proper to introduce (*t*). A declaration of title to the land being thus obtained, in pursuance of the proprietor's petition, the effect of it is stated as follows:—"that such declaration of "title, as soon as it shall have become final for the purpose "of this Act, shall in favour of any person thereafter "deriving title as a purchaser, for valuable consideration, "of the land therein referred to, or of any part thereof, or "of any estate, right or interest therein, from or under

Sect. 10.
See *schedules* subjoined to 25 & 26 Vict. c. 67 - Scheds. 4, 5.

(*r*) Sect. 7.
(*s*) Sched. 8.
(*t*) Sect. 15.

"the person whose title has been so declared, be deemed "and taken to have correctly declared the same: but, "save as aforesaid, such declaration shall have no force "or effect whatever as to the title of the land comprised "therein" (*u*).

The whole law relative to the rights of property in things real, (exclusively of what relates to their violation, and to the remedies in such case provided,) has now come in due order under discussion; and the second part of the present Book of these Commentaries—that which relates to Things Personal—will be entered upon in the next volume.

The subject which has thus employed our attention is of very extensive use and importance, but it must be confessed, not very attractive at the first aspect. [To say the truth, the vast alterations which the doctrine of real property has undergone from the Conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for so many centuries without much order or method; and the multiplicity of acts of parliament, which have amended or sometimes only altered, the common law,—these causes have made the study of this branch of our national jurisprudence at once laborious and intricate. It has been our endeavour principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet it is

(*u*) 25 & 26 Vict. c. 67, s. 24. By sect. 29 the declaration of title shall not affect land tax, succession duty, tithe rent charge, rights of common, rents payable to the crown, public rights of way, liability to repair highways by reason of tenure, rights of way, watercourses, rights of water and other easements or servitudes, manorial rights and franchises, leases or agreements for leases for any term not exceeding twenty-one years, where there is occupation under the same.

END OF THE FIRST VOLUME

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